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IN THE

SUPREME COURT

OF THE

United States

OCTOBER TERM, 1958

No. 764

THOMAS EISTRAT

Petitioner,

vs.

WESTERN HARDWOOD LUMBER COMPANY, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

X THOMAS EISTRAT
1020 S. Almansor Street
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in pro se

LONG BEACH REPORTER

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PETITION FOR A WRIT OF CERTIORARI

To the Honorable Chief Justice and to the Honorable Associate Justices of the Supreme Court of the United States of America:

Thomas Eistrat, petitioner, prays that a writ of certiorari issue to review the judgment entered October 20, 1958 by the District Court of Appeal of the State of California, Second District, which affirmed the judgment of the Superior Court of Los Angeles County.

REFERENCE TO OFFICIAL AND UNOFFICIAL OPINIONS AND REPORTS[a]

The opinion and order of the District Court of Appeal is printed in Appendix B hereto, pages 6-18; it is reported in 164 A.C.A. 388, 330 P 2d 629. Rehearing denied without opinion is reported in 164 A.C.A.

No. 6, Minutes 4. Petition for hearing in the Supreme Court of the State of California denied without oral or written opinion is reported in 51 A.C. No. 9, Minutes 3.

The trial court did not render an opinion or deliver an oral statement or reasons for arriving at its decision; its judgment and findings of fact and conclusions of law are unreported and printed as Appendix C hereto, pages 19-27.

Footnote "a": Reference to companion case opinions and reports.

The judgment and findings of fact and conclusions of law of the United States District Court of petitioner's petition to reclaim property, in the case of In re Tom G. Jones, bankrupt, referred to in aforesaid reported opinion 164 A.C.A. 388 of said District Court of Appeals are unreported, included as Pl. Ex. 6, 8; R.T. 151, 153; and printed in Appendix D hereto, pages 28-40.

The opinion of said United States District Court in regard to aforesaid federal judgment referred to in said state court's reported opinion was not reported and not part of the record in the instant case against respondent Western Hardwood Lumber Company—however, since the state courts in petitioner's case have referred to and erroneously based their decisions on some of the findings made in connection with that federal case, and so did contrary to decisions of the United States Supreme Court and prior California decisions, petitioner also prints as Appendix E hereto, pages 41-43, this opinion of the federal court as to the basis for its judgment. It is on file in a certified reporter's transcript in the federal court.

The opinion of the California State Supreme Court in petitioner Cekada, referred to in aforesaid reported opinion 164 A.C.A. 388 of said District Court of Appeal of this instant case is reported in 50 A.C. 222, 324 P 2d 881, and is printed in Appendix F hereto, pages 44-49.

The judgment and opinion of the United States District Court on petitioner's claim against the Massachusetts Bonding Company in aforesaid case of In re Tom G. Jones, bankrupt, is unreported, included in the record on appeal to the courts below as Pl. Ex. 12, R.T. 157:157 in evidence, and printed as Appendix G hereto for the convenience of the court.

JURISDICTION

The judgment of the District Court of Appeal was entered on October 20, 1958. A timely filed petition

for rehearing was denied without opinion on November 13, 1958. A timely filed petition for hearing then filed in the California State Supreme Court was denied without opinion on December 17, 1958. The jurisdiction of this Court is invoked under 28 U.S.C., s. 1257 (3); since the denial of due process and equal protection of law and the disregard for full faith and credit to be afforded a final judgment of a United States District Court within its jurisdiction—on the grounds of repugnancy to the Constitution of the United States are drawn in question, and were raised in the courts below and the case cannot be resolved on state law.

Under the California State Constitution the jurisdiction of the California State Supreme Court to review was discretionary (Art. 4, s. 4), and when petitioner timely invoked that jurisdiction the order of the Supreme Court denying hearing made certain the case could go no further in the state courts, making said District Court of Appeal the highest court of the state in which decision could be had, and making the time for petitioning the United States Supreme Court run from December 17, 1958 (*Mich-Wis. Pipe Line Co. v. Calvert*, 347 U.S. 157).

QUESTIONS PRESENTED FOR REVIEW

1. Whether it is a denial of due process and equal protection of federal law for a state court to deny a party judgment for conversion of his property in a timely brought action where a prima facie case is established in evidence and no defense is established.

2. Whether findings necessary to support a state court judgment can consistently with due process and

equal protection of federal law be based upon matters which the court expressly prohibited the party any opportunity to be heard.

3. Whether it is a denial of due process under the XIVth Amendment of the United States Constitution for the highest California state court in which appeal could be had to hold petitioner bound by a portion of a finding it deems against petitioner, while failing to give full faith and credit to the final judgment in rem itself, which is wholely in petitoner's favor. The federal judgment was pled as being res adjudicata, and received in evidence.

4. Whether a final judgment in rem of a United States District Court, having jurisdiction of the subject matter and parties, is entitled to full faith and credit and effect in a state court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional and statutory provisions involved are: Article I, Sec. 8, sub. 4; Article III, Sec. 2; Article IV; Article VI of the United States Constitution and Amendment XIV thereto; U.S.C. 1946 Sec. 1 (10), Chap. 1, Title 11; and Sec. 11(a), Chap. 2, Title 11, Bankruptcy Act; and California state laws Sections 1541 and 3268, pages 268 and 589, Deering Civil Code, 1949 Edition; and Sections 1867, 1869 and 1908, pages 721, 722, and 741, Deering Code of Civil Procedure, 1953 Edition, California Statutes, 1945, Chap. 85, Sec. 7 and Article IV, Section 4, California State Constitution. They are printed in Appendix A hereto, pages 1-4.

STATEMENT OF THE CASE

The Case, and How the Federal Questions Were Raised and Ruled Upon, and References to the Record.

Petitioner alleged a simple cause of action for conversion of lumber by respondent, and another cause of action against respondent for conversion of lumber as an intentional trespasser and joint venturer with one Jones. In the later cause of action, petitioner alleged that as a result of a petition to reclaim property petitioner filed in the Jones bankruptcy proceeding, the federal court entered final judgment in rem decreeing that at no time did Jones have any right, title or interest in the timber, logs or lumber on or removed from petitioner's property.

The federal question of the federal judgment in rem being res judicata as to the title to the lumber being in petitioner was first raised in petitioners complaint as last amended (C.T. 53, 61, 62, 63).

Respondent admitted it took the lumber from petitioner's land and refused to return it to petitioner, claiming it had paid for the lumber to Jones and that Jones had a right to take it from petitioner—and the courts below so found.

The trial court ordered liability to be tried before damages.

At the trial petitioner had the final judgment on his petition to reclaim property in the Jones bankruptcy proceeding received in evidence. This judgment in rem held that Jones, under whom respondeent claimed, had no title to the lumber and that it was petitioner's property. (Appendix D hereto, pages 28-40).

As the first opportunity at the opening of the trial petitioner objected to the trial of the issue of title on the basis of the title having been adjudicated by the federal judgment in evidence, and a retrial thereof would be a collateral attack upon the federal judgment in contravention of petitioner's rights of due process and equal protection of law under the XIVth Amendment of the United States Constitution (R.T. 32-35). The objection was overruled by the court (R.T. 40).

Petitioner attempted to also show what happened between Jones and petitioner, and respondent had the court sustain objections to such offers of evidence on the ground of hearsay as to respondent.

Petitioner had received in evidence (1) the deed to him showing ownership of the land in fee simple in 1926, (2) the cutting and aspectation of the timber and lumber, and its subsequent possession by respondent, and (3) respondents refusal to return the lumber upon petitioner's demand.

Petitioner then attempted to offer evidence negating respondent's defenses, and the court ordered petitioner to "never mind the defenses. Let the defense put on its own case. You will have an opportunity to rebut those, if you wish to."

Upon these facts, and proof of the ownership of the land, petitioner rested. Petitioner had made a prima facie case of liability.

The leading case of United States v Denver & Reo Grande R.R., 191 U.S. 84 is quite in point herein. There the United States Supreme Court stated:

> "Plaintiff alleged simply a conversion—made a prima facie by proving—ownership of the lands, the cutting and asportation of the tim-

ber, its value and its subsequent possession by defendant. Here they were entitled to rest, and did rest.—If the burden of proof would rest upon the defendant to show the cutting of timber for a proper purpose, evidently it could not shift the burden upon the plaintiffs by employing an agent to do the work.

Upon principle, as well as upon authority, a party who has been shown to be *prima facie* guilty of a trespass, and relies upon a license, must exhibit his license and prove that his acts were justified by it. The practical injustice of a different rule is manifest."

Respondent moved for a non-suit immediately upon petitioner resting his prima facie case. The non-suit motion was not granted and the only defense that respondent offered was petitioners testimony that he received money from Jones. Petitioner testified this money was applied to damages Jones did and not to payment for any timber of lumber.

The receiving of money from Jones did not establish respondent's affirmative defense of payment. The law on this point is clear.

"The defense of payment is affirmative and is never established by the mere proof that the claimant has received money. The proof must go further and establish that the money so received can be applied in discharge of the debt or obligation."

Hollywood Wholesale Electric v John Baskin, Inc., 121 CA 2d 415

Respondent and petitioner both then rested and the court without expressing any opinion ordered judg-

ment for defendant on the liability issue (which had been ordered tried first).

The court signed the findings of fact and conclusions of law as prepared by defendant, without holding hearing for settlement of the findings and conclusions of law as proposed by plaintiff.

Petitioner then made motion for new trial, where the following occured:

"THE COURT: In the Eistrat versus Western Hardwood Lumber case, I have examined the notice of intention to move for a new trial, and the affidavit of the plaintiff in support thereof.

You may present your argument now.

MR. EISTRAT: Your Honor, my argument is set forth in my memorandum of points and authorities, which I served and filed. It is quite lengthly, but I believe its hows that there was an actual denial of a day in court; furthermore, that there was action that transpired that could not be reasonably guarded against, and that there was error in law that occurred.

I believe that I have set forth in my memorandum sufficient points to substantiate the grounds which I set forth in my notice.

I would also like to state for the record, your Honor, that I believe that the proceedings heretofore had herein have been a denial of due process and equal protection of law, in contravention of the 14th Amendment of the United States Constitution.

With that, your Honor, unless your Honor wishes some further matter, or it should be necessary after the defendant makes his statement, I would rest. Thank you.

THE COURT: The motion for a new trial is denied." (R.T. 232, 233).

The trial court expressed no opinion, orally or in writing, on the federal questions raised on the motion for new trial.

In the cited case of United States v Denver Rio Grande R. R., 191 U.S. 84, the Supreme Court of the United States reversed the judgment of the courts below because there was error in requiring plaintiff (who had established a prima facie case of conversion) to assume the burden of showing that the timber was not cut for the purposes (of the license).

The California courts in this instant prima facie case of conversion have not only seemed to assume that petitioner should have assumed the burden of showing that Jones (under whom respondent claimed title) did not have a right to the lumber but also that petitioner could not assume such burden of showing Jones did not have a right to the lumber until after respondent put on its defenses. As respondent made no defense to petitioner's prima facie case, petitioner was even prohibited from proving the negative.

Petition duly filed appeal with the District Court of Appeal, setting forth in his opening and closing briefs as assignment of error the same matters raised in the trial court as being a denial of due process and equal protection of law in contravention of the XIVth Amendment of the United States Constitution. (App. O.B. 13, 18; R.B. 12).

The District Court of Appeal in affirming the judgment ruled upon the federal questions and stated that petitioner was not denied due process of law, had every opportunity to be heard, the evidence supported

the findings, and further that petitioner was bound by a finding of payment of the federal court (Appendix B-16, 17, 12, 13, hereto).

In a timely filed petition for rehearing, petitioner raised further federal questions of due process of law in contravention of the XIVth Amendent of the United States Constitution, assigning as error the appellate court's order and opinion (1) relying upon the statements of affirmative defenses upon which plaintiff was specifically prohibited from offering any evidence, and (2) its collateral attack upon the final federal judgment in evidence by disregarding it, not giving it full faith and credit as being res judicata in rem, and by misinterpreting a few words in its findings as to payment, and (3) by not ordering judgment for plaintiff, where he had established his prima facie case and no defense to the conversion was made (App. P. H. 1, 2, 3, 4, 8, 15, 16, 32, 39).

After denial of petition for rehearing, petitioner timely filed petition for hearing in the California State Supreme Court, raising the federal questions raised in the courts by assignment of error as being in contravention of the XIVth Amendment of the United State Constitution (App. P.H. 1, 2, 3, 10, 14, 18, 30, 32, 47, 55, C-14, 15). The court declined to exercise its discretionary review, leaving the District Court of Appeal's decision and opinion that of the highest state court in which appeal could be had.

(For convenience of the court, should additional details be desired of the facts and of how the federal questions were raised and ruled upon, such matter are printed in Appendix H and I, hereto).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I

Petitioner made a prima facie case on conversion of his lumber by respondent. The trial court would not grant respondent's motion for a non-suit, further establishing the fact that petitioner made a prima facie of conversion.

After petitioner made his prima facie case, the trial court specifically prohibited petitioner from offering evidence to anticipate respondent's alleged defenses. Respondent made no defenses and both parties rested.

> "The right under the due process clause to a full hearing includes the right to introduce evidence and have judicial findings based upon it."
>
> *Baltimore & Ohio Ry. Co. v. United States*, 298 U.S. 349, 368, 369.

The California state courts below have failed and refused to base the judicial findings and judgment on petitioner's prima facie case established in evidence, thereby denying him due process and equal protection of law in contravention of the XIVth Amendment of the United States Constitution.

II

The United States Supreme Court has uniformly held that the successful party in a United States District Court has no right of appeal for the purpose of procuring a review of the findings of the federal

court below of which he complains. (*Lindheimer v. Illinois Bell Tel.*, 292 U.S. 151, 176; *Elect. Fitting Corp. v. Thomas & Betts*, 307 U.S. 241; *Public Service Comm. v. Brashear Lines*, 306 U.S. 204, 206; *N.Y. Tel. v. Maltbie*, 291 U.S. 645)—thus ruling such findings of the federal courts are immaterial and not adjudications against the successful party.

The California State Supreme Court has uniformly held that the successful party in a California State Court has no right of appeal for the purpose of procuring a review of the findings of the state court below of which he complains, and that such findings contrary to a California State Court judgment or immaterial to it—are immaterial and not adjudications against the party who prevails (*Albertson v. Raboff*, 46 Cal. 2d 375, 295 P 2d 405, 411, 412; Estate of Funkenstein. 170 Cal 594).

It appears however, that there is no direct holding of the United States Supreme Court stating that state courts can treat findings from federal court judgments differently than such federal court findings are treated in the federal courts—in regard to the effect to be given findings that are contrary or immaterial to the final federal judgments. Both the federal courts and the California state courts regard findings that are contrary to their own judgments after they are entered and become final—as immaterial and not adjudications or evidence to be used in any other proceedings in their own courts.

The District Court of Appeal's opinion states that petitioner is bound by the findings of the federal court that petitioner accepted payment for and on account of lumber cut by Jones, and therefore respondent es-

tablished its defense to the conversion action, since it took through Jones.

The District Court of Appeal's opinion misconstrues the effect of those words used in a portion of one of the findings of the federal court. There is no finding of the federal court showing how much timber was cut by the Jones partnership or Jones, how much money was due petitioner, whether petitioner ever received payment for all the damages caused by the forest hazards caused, whether payment was ever received for all of the timber cut, or to what timber cut any payment was to be applied. That finding of the federal court in regard to acceptance of payment appears only in a portion of finding V. It does not appear and was not carried into the federal court's conclusions of law, nor judgment.

The finding of the federal court in regard to acceptance of payment does not stand by itself in any of the federal court's findings—it is tied to the express finding of the federal court in paragraph V that "any default in the performance of the terms and conditions of said agreement by the partnership and the bankrupt, except compliance with the terms and provisions of paragraph FOUR thereof, were waived—"

Parapragh II of the federal court's findings show the contract expressly provided that Jones partnership had no right to cut any timber in violation of the fire laws. The federal court's finding IV expressly found that the partnership commencing the first week in August, 1948, continuously violated the fire laws required for operations on petitioners property, and that the same constituted a serious fire hazard.

The effect of paragraph V and all findings of the

federal court was that the contract respondent relies upon could not be enforced because of the continuous violations of the express conditions of compliance with the fire laws by the Jones partnership from the commencement of its operations. The conclusions of law by the federal court were to the same effect. The final judgment entered also decreed that at no time did the Jones partnership, or those claiming under it, acquire any right, title or interest in the timber or lumber on or removed from petitioner's property. The federal court's opinion in this regard is very forceful and very clear (Appendix E, 41, 42, hereto). So is the federal judgment itself (Appendix D, hereto); the subsequent federal judgment for slash pile removal costs in 1949 against Mass. Bonding & Surety Company by the same federal judge (Appendix G, hereto); and the subsequent judgment against Cekada (Appendix F, hereto).

Those few words in finding V of the federal court's finding in regard to payment, can be considered material and very favorable in support of the final federal judgment. They should be interpreted as meaning "even if petitioner had taken any or full payment for all timber cut, still neither the Jones partnership nor those claiming under it could obtain title to any of the timber products because all of it was cut in violation of express conditions of a contract which prohibited cutting and taking timber products in violation of fire laws—conditions which public policy expressly prohibited any waiver thereof."

If those few words of the federal findings in regard to payment are not so regarded, then they are immaterial as they do not support the federal judgment,

and are not adjuications by the federal court against petitioner.

The California State Courts have now established an erroneous precedent to weaken or disregard the effect of final federal judgments when introduced in evidence in California State Court actions by holding that findings of payment be given effect against petitioner while the federal judgment itself is to be disregarded and given no effect.

This precedent of the California State Courts is discriminatory against not only petitioner, but also against all persons who rely upon United States Supreme Court decisions in regard to the effect to be given findings and final judgments of federal courts by the California State Courts. This discrimination is strong inducement for the United States Supreme Court to exercise its authority and leave no uncertainty as to the matter (*Forsyth v. Hammond*, 166 U.S. 506, 515; *Ex parte Harding*, 219 U.S. 363, 369).

III

Another important reason that a review under writ of certiorari should be granted is the denial by the California State Courts to give effect to petitioner's plea of res adjudicata arising from the final judgment in rem of the bankruptcy court. Respondent's sole defense to conversion is that it took the lumber under Jones. Respondent therefore establishes itself as bound with Jones (*Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48-49). And, of course, were the bankruptcy court judgment not in regard to property, respondent would be bound by the bankruptcy judgment as being

in privy with Jones. But the bankruptcy judgment is final in regard to the title to the property. It held Jones never had any right to the timber cut or products made therefrom. The judgment being in rem, petitioner's title to the property was quieted by the bankruptcy judgment. Respondent makes no claim to acquiring title to the lumber directly from petitioner. The final bankruptcy court judgment in rem prohibits respondent from establishing title through Jones. Petitioner's title is established in evidence by the deed to him in fee simple in 1926.

This court, in *Heiser v. Woodruff*, 327 U.S. 726, 733, *Stoll v. Gottlieb*, 305 U.S. 165, and *Chicot County Dist. v. Bank*, 308 U.S. 371, has heretofore required that effect be given in state courts to a plea of res adjudicata arising from a final decree of a brankruptcy court.

This court has also stated in *Stoll v. Gottlieb*, 305 U.S. 165, that the failure of a state court to give full faith and credit to a bankruptcy court judgment raises a federal question and confers jurisdiction upon the United States Supreme Court.

This court also has stated in *Johnson v. Horton*, 152 U.S. 252, 257, that the peace and order of society demand adherence to the doctrine of res judicata.

CONCLUSIONS

The state court judgment not being supportable as a matter of state law, and the important federal questions having been timely and properly raised in all the state courts below in which decision could be had, and the state court rulings upon the important federal questions being contrary to the way petitioner believes the United States Supreme Court would rule, and for all the reasons set forth in this petition—the petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS EISTRAT
In pro se.

March 9, 1959.

APPENDIX "A".

Constitutional Provision and Statutes Which the Case Involves:

I

Article IV, of the Constitution of the United States, which reads as follows:

> "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

II

That portion of Article VI of the Constitution of the United States, which reads as follows:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

III

Article XIV, of the Amendments to the Constitution of the United States, which reads as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

IV

Article I, Sec. 8, Sub. sec. Fourth of the Constitution of the United States:

"To establish an uniform rule of naturalization and uniform laws on the subject of bankruptcies throughout the United States.

V

Article III, Sec. 2, of the Constitution of the United States:

"The judicial power shall extend to all cases in laws and equity arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; . . ."

VI

U. S. C. 1946, Sec. 1 (10), Chap. 1, Title 11, Bankruptcy Act:

" 'Courts of bankruptcy' shall include the district courts of the United States and of the territories and possessions to which this title is or may hereafter be applicable and the District Court of the United States for the District of Columbia;"

VII

U. S. C. 1946, Sec. 11(a), Chap. 2, Title 11, Bankruptcy Act:

"The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—"

VIII

Section 1541, Civil Code, Chapter VI, Deering, 1949 Edition, page 268, which reads as follows:

"An obligation is extinguished by a release therefrom given to the debtor by the creditor, upon a new consideration, or in writing, with or without new consideration."

IX

Section 3268, Civil Code, Title XVI, Deering, 1949 Edition, page 589, which reads as follows:

"Except where it is otherwise declared the provisions of the foregoing fifteen titles of this part, in respect to the rights and obligations of the parties to contracts, are subordinate to the intention of the parties, when ascertained in the manner prescribed by the chapter on the interpretation of contracts; and the benefits thereof may be waived

by any party entitled thereto, unless such waiver would be against public policy."

X

Section 1867, Code of Civil Procedure, Deering, 1953 Edition, page 721, which reads as follows:

"None but a m a t e r i a l allegation need be proved."

XI

That portion of Section 1869, Code of Civil Procedure, Deering, 1953 Edition, page 722, which reads as follows:

"Each party must prove his own affirmative allegations. Evidence need not be given in support of a negative allegation, except when such negative allegative allegation is an essential part of the statement of the right or title on which the cause of action or defense is founded, . . ."

XII

Section 1908, Code of Civil Procedure, Deering, 1953 Edition, page 741, which reads as follows:

"The effect of a judgment or final order in an action or special proceeding before a court or judge of this state or of the United States, having jurisdiction to pronounce the judgment or order is as follows:

"1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title

to the thing, the will, or administration, or the condition or relation of the person.

"2. In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding."

XIII

California Statutes, 1945, Chapter 85, Section 7, reading as follows:

"All timber operators engaged in the cutting and removal of timber or other forest products from forest lands, for commercial purposes, shall register with the State Forester, to perform such operations. The fee for such registration shall be One Dollar ($1.00) per year. Any timber operator who fails to register as provided for in this section, shall be prohibited from cutting or removing timber or other forest projects for commercial purposes from forest lands."

XIV

That portion of Article 4, Section 4, of the California State Constitution reading as follows:

"The Supreme Court shall have appellate jurisdiction—in all cases, matters and proceedings pending before a District Court of Appeal, which shall be ordered by the Supreme Court to be transferred to itself for hearing and decision,—"

APPENDIX "B".

Reported 164 ACA 388, 330, P 2d 629

In the District Court of Appeal of the State of California, Second Appellate District, Division One.

THOMAS EISTRAT,

Plaintiff and Appellant,

vs.

WESTERN HARDWOOD LUMBER COMPANY, a Corporation,

Defendant and Respondent.

CIVIL No. 22652
FILED
Dist. Court of Appeal—Second Dist.
OCTOBER 20, 1958
J. E. BROWN, *Clerk*

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Deputy Clerk

APPEAL from judgment of Superior Court of Los Angeles County. Vernon W. Hunt, Judge. Affirmed.

For Appellant: Thomas Eistrat, in propria persona.

For Respondent: Wright, Wright, Goldwater and Wright, Loyd Wright, Edgar R. Carver, Jr.

The action in the court below involved a claim of damages for conversion of lumber cut from timberlands owned by plaintiff. The matter was heard by the court sitting without a jury. It is from the judgment for defendant, plaintiff appeals.

Viewing the evidence in a light most favorable to respondent, the essential facts are these: Plaintiff and his wife owned timber-bearing lands in Tulare County. On August 2, 1948, they entered into a timber sales agreement with Jones Lumber and Mill Company (hereinafter referred to as Jones Company) under which it was to enter plaintiff's land and cut and log timber. The contract provided in paragraph TWO: "that no title or ownership of any timber shall pass from seller until after the timber is cut," and payment therefor shall be made each week for all timber cut the preceding week. Paragraph FOUR required compliance with all laws, rules and regulations pertaining to logging; and paragraph ELEVEN provided that should Jones Company fail to cut and pay for timber as required it shall have no right to continue cutting without prior written authorization from plaintiff.

On August 6, 1948, Jones Company moved a small mill onto the property and proceeded to cut timber which it sold to various purchasers, including defendant. On October 8, 1948, plaintiff visited the premises, observed a lack of adequate fire protection and orally advised Jones Company he was terminating the agreement. He also notified it in writing on October 11, 1948.

Up to October 8, 1948, defendant, a prior customer of Jones Company, made from it considerable purchases of timber cut and logged, receiving 11 loads. Thereafter, defendant took 3 loads of lumber from plaintiff's property—2 on October 19, 1948, and 1 on October 21, 1948. In all, defendant bought from Jones Company, and fully paid for, 86,958 board feet of lumber. On October 25, 1948, defendant made to Jones

Company its last payment in full for all lumber purchased by it, concluding their dealings.

Prior to October 11, 1948, plaintiff had received various payments from Jones Company for timber cut; and from that date through the beginning of December, 1948, plaintiff continued to receive and cash checks from Jones Company on account of lumber cut and logged by it, the last, in the sum of $1,600 dated December 3, 1948, During the last of November or the first part of December, 1948, plaintiff, claiming he had not received all of the money due from Jones Company under the contract, told defendant's vice-president he intended to sue Jones Company for monies due him; and on December 9, 1948, plaintiff's wife sued Jones Company in Tulare County. In this suit plaintiff and his wife acknowledged receipt of the payments from Jones Company on account of timber cut and logged under the agreement of August 2, 1948, and sued to recover the balance due. In that action certain monies due Jones Company in the hands of another of its customers, Brush Industrial Lumber Company, were attached.

Subsequently, on June 24, 1949, Jones filed a petition in bankruptcy in the Federal court, No. 6688, in which proceeding plaintiff's wife filed a claim based on the contract of August 2, 1948.

In 1949, after the filing of the bankruptcy proceeding, plaintiff asked defendant's vice-president to aid him in establishing his claim against Jones Company under the contract by supplying him with an account of the amount of lumber received by defendant from Jones Company and paid for. Defendant did so. Jones was adjudicated a bankrupt and on September

29, 1949, plaintiff filed a petition to reclaim his timber property in the Federal court, which petition was granted September 27, 1951. Its order was entered October 21, 1951.

Subsequent to the discharge of Jones as a bankrupt, plaintiff on August 15, 1951, made his first and only demand on defendant for the return of the lumber it had purchased from Jones Company and fully paid for, or its purchase price. This action for conversion resulted.

With respect to the lumber purchased by defendant from Jones Company, the trial court found that: "said Jones Lumber and Mill Company had title to said lumber and were the owners thereof and that the plaintiff and the said Elma Eistrat did not at any time subsequent to August 2, 1948, and do not now have, nor did either of them have at any time subsequent to August 2, 1948, nor now have, any right, title or interest in or to said lumber, or any part thereof."

Appellant has made a general attack on all of the court's findings, urging that "there is no substantial support in evidence to support any of the findings as to any facts found." His real contention seems to be that since Jones Company violated the fire laws, and hence the terms of the agreement, all lumber cut by it was wrongfully cut, title did not pass to it, and therefore could not pass to defendant.

Basically, the main issue before this court is whether the trial court's finding that Jones Company had title to the lumber sold to defendant is supported by substantial evidence.

If plaintiff failed to meet the burden of proving his ownership to the cut lumber and right to its possession,

the judgment of the trial must be affirmed. It is well settled that "(I)n an action for conversion plaintiff must prove either (1) ownership with the right of possession, or (2) actual possession of the article claimed to have been converted at the time of the alleged conversion. (Citations.)" *Scutt* v. *Bassett*, 86 Cal. App. 2d 373, at page 375. Applying the foregoing rule to the evidence in the instant case, it is clear plaintiff failed to establish a cause of action for conversion. The record shows that plaintiff had neither ownership of the lumber with a right to its possession, nor actual possession of it; and that Jones Company had good title to all lumber it cut and logged under the August 2, 1948, contract, and sold to defendant.

Nor is there evidence that the 3 loads of lumber taken by defendant from plaintiff's property after October 8, 1948, were cut after the termination of the contract, in fact, the evidence points the other way. Jones Company's mill was not in operation on October 8, 1948; on that day its logging contractor told Jones in plaintiff's presence that he would do no more cutting; and there is no evidence that any cutting took place after October 8, 1948. In its letter of October 14, 1948, to plaintiff protesting termination of the contract, Jones Company advised him that the felling of timber had run about 25,000 feet ahead of the logging operation. Obviously, the 3 loads of lumber taken by defendant after October 8, 1948, were cut before the termination of the contract, although not all removed by defendant until October 21, 1948. As to whether Jones Company had title to the already cut timber it is clear both from the contract itself and the authorities that timber severed from the soil under the provisions of an agreement, license or permit, before the

expiration or revocation thereof, becomes the personal property of the purchaser or licensee. He is vested with the rights incident to ownership of personal property and is entitled to remove it as his own. (*Sorensen* v. *Jacobson*, 125 Mont. 148, 232 P. 2d 332 (1951); 54 C.J.S., §29 (c), Logs and Logging, pages 730-731.) One who has felled lumber under a purchase agreement retains title to the lumber after the agreement has been revoked. (*Anderson* v. *Moothard*, 198 Ore. 354, 256 P. 2d 257.)

Appellant argues that although he did not terminate the agreement until October 8, 1948, when he discovered the violation of fire laws, since the first week of August, 1948, Jones Company had violated them and its right to cut lumber terminated the first week in August. This argument completely ignores the authorities heretofore cited governing ownership of timber cut before revocation of an agreement. It also overlooks the terms of the contract of August 2, 1948, as well as the evidence. Nothing in the contract precludes the application of general logging rules; in fact, the agreement specifically provides for passage of title after the lumber is cut, and payment each week for that cut the preceding week. The penalty for breach of any of the terms of the contract is not forfeiture of lumber cut, but a termination of the right to continue further cutting. Besides, any breach of contract by Jones Company prior to the termination of the contract by plaintiff could not in itself constitute the basis for a conversion. (*Emmert* v. *United Bank Etc. Co.*, 14 Cal. App. 2d 1.) Factually as well as legally, there is no merit to appellant's contention, because the evidence fails to point to any breach of the agreement of August 2, 1948, prior to October 8, 1948. In fact,

plaintiff admitted that prior to October 8, 1948, he had no reason to believe Jones Company was not complying with the agreement, and had made prior visitation to the premises on September 4, 1948. Plaintiff was apparently satisfied with its operations under the contract until October 8, 1948, because he made no objection thereto, and received and cashed checks amounting to $1,573.45 from Jones Company under the contract until October 6, 1948. On October 8th, he voiced his first complaint, and then it concerned only inadequate fire protection and the method of cutting. Of interest at this point is Finding V of the Federal Court in the bankruptcy action, U.S.D.C. No. 6688, made September 27, 1951. The lower court in that connection found as follows: ". . . that said U.S.D.C. in its findings in support of said order entered October 1, 1951, among other things, declares that any default in the performance of the terms and conditions of said timber sales agreement (hereinabove referred to) were waived by Thomas Eistrat and Elma Eistrat by acceptance of payments for and on account of lumber cut and logged by the partnership and the bankrupt with knowledge of the delinquency of the partnership and the bankrupt in performance of said provisions, with the exception of those provisions relating to compliance with the forestry rules with respect to fire hazards."

Appellant objects to the trial court's finding herein on the ground that the Federal court's finding upon which it was based was unnecessary to support the Federal judgment, was surplusage and therefore cannot bind plaintiff. There is no doubt but that plaintiff, a party to the bankruptcy action, is bound by the Federal court's finding that plaintiff waived certain de-

faults of Jones Company by accepting payments from it, as well as by accepting payments upon plaintiff's claim in bankruptcy. (*Bernhard* v. *Bank of America*, 19 Cal. 2d 807; *Hardware Mut. Ins. Co.* v. *Valentine*, 119 Cal. App. 2d 125; *Martin Music Co.* v. *Robb*, 115 Cal. App. 444.) The payments referred to by the Federal court are those received by plaintiff from Jones Company after plaintiff notified it of its breach and terminated the agreement. The last payment accepted by plaintiff consisted of $1,600 on December 3, 1948.

Appellant has cited for our attention the recent Supreme Court opinion in *Eistrat* v. *Cekada*,[1] 50 Cal., wherein he claims that the court found the Federal findings held that he and not Jones had title to the lumber. A reading of this opinion discloses a discussion concerning only the interpretation of a restraining order issued by the bankruptcy court to prevent actions against the bankrupt. Other findings relating to the ownership of the timber were not discussed.

The trial court further found that plaintiff affirmed title in Jones Company to all lumber cut by it on plaintiff's property prior to December 9, 1948, by instituting a suit on that date in Tulare County in the name of his wife, in which they acknowledged receipt of certain payments on account of the timber cut and logged under the contract of August 2, 1948, and sought to recover a balance allegedly due for timber cut and logged under the agreement. Here again are presented questions of fact which the trial court decided adverse to plaintiff. The evidence is substantial to support the finding and the reviewing court will not

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1 Advance Report Citation: 50 A.C. 222

disturb it. Furthermore, the Federal court heretofore made a similar finding in this connection which is binding on plaintiff.

Substantial evidence in the record also sustains the trial court's finding that plaintiff waived rights, if any he had against defendant in conversion, and elected to pursue his remedy against Jones Company. It is clear that originally plaintiff deliberately chose to proceed against Jones Company. He so advised defendant in early 1948. Later, after he had proceeded against Jones Company and wanted to file his claim in the bankruptcy court against Jones, he even enlisted and received defendant's aid and assistance. It was not until he had exhausted his remedies against Jones Company and failed to satisfy his alleged claim that he decided to proceed against defendant, and then for the first time he made demand on it, after 2½ years. Appellant urges that the evidence shows that on October 11, 1948, plaintiff gave defendant notice that Jones Company did not have title to the lumber; but the trial court, as it had a right to do, rejected this testimony when defendant's vice-president testified to the contrary. Plaintiff also contends that the monies he accepted were only to hold as set-off or security collateral for damages; and that the attachment of funds held by Brush Industrial Lumber Company in the Tulare County action was without his authorization. Again the trial court decided from the evidence the factual questions how, in what manner and for what purposes the monies were received by plaintiff.

Appellant argues that the trial court erred in refusing to permit his witness, Noral Sweem, to testify to a conversation between plaintiff and Jones outside

of the presence of defendant. The record is not too clear what plaintiff wanted to prove since no formal offer of proof was made, but it discloses that Sweem hauled lumber to defendant from plaintiff's property in September and October of 1948, He testified that on October 8th, he was on the premises and heard an argument between Tom G. Jones and plaintiff. When plaintiff asked him the conversation, objection was made on the ground of hearsay. Asked by the court the purpose of the evidence, the plaintiff replied:

> "MR. EISTRAT: I want to prove by this conversation my allegation. I have a joint venture allegation in my complaint, Third Amended Complaint, your Honor, and I believe all the participants in the joint venture are bound by the acts of the others in the venture, and I want to prove the facts.
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> "THE COURT: Is it your theory that the Western Hardwood Lumber Company was engaged in a joint venture within the meaning of the law defining joint ventures?
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> "MR. EISTRAT: Yes, your Honor.
>
> "THE COURT: With Jones?
>
> "MR. EISTRAT: Yes, your Honor."

The objection was sustained on the ground that a proper foundation had not been laid, since there was no evidence in the record supporting a joint venture and it was hearsay as to defendant.

The record is bare of any evidence of a joint venture between defendant and Jones Company and the ruling was proper. Plaintiff claims some did exist and relies primarily upon $3,000 defendant paid to Jones Com-

pany on August 18, 1948. But the record is clear that defendant had been a prior customer of Jones Company; had a contract with it for purchase of cut lumber and the $3,000 was an advance payment on lumber to be later delivered; that 14 loads of lumber were subsequently delivered to defendant and that the difference between the $3,000 and the total amount was fully paid; and that all lumber delivered was paid for by defendant to Jones Company by October 25, 1948, on which date they concluded their business. Based upon this evidence, the trial court found that the $3,000 was a loan to be, and was, repaid by Jones Company by loads of lumber and that no joint venture or partnership existed between them.

Appellant contends that because of the court's refusal to allow in the testimony of Mr. Sweem, and for other reasons, he was denied due process of law. We have already ruled on the propriety of the court's action in connection with Sweem's testimony, and it is clear that at no point during the trial was appellant denied due process of law. On the contrary, the record is replete with assistance given to plaintiff by the court. Plaintiff appeared in propria persona, and although he has had prior court experience in various cases involving his own litigation and some law training, the trial court was patient, courteous and helpful to him. He was fully heard and he had every opportunity to offer numerous exhibits (40 in all), present his evidence and argue extensively. The record does not show that plaintiff was in any way precluded from putting on his case.

On the issue of estoppel, appellant claims that assuming he is estopped because of his conduct in suing

in Tulare County and accepting the money from Jones Company, an estoppel against defendant exists in his favor, which should place the parties on an equal basis. In the first place, the court did not and could not find from the evidence facts to support an estoppel favoring plaintiff. The record does not show evidence to support any kind of a finding that the defendant knew of Jones Company's violation of the fire laws; that defendant knew Jones Company did not own the timber; that defendant paid unconscionably low distress prices for it, or that any estoppel in plaintiff's favor existed. On the contrary in connection with plaintiff's contention that defendant, at the time it took the lumber, knew Jones Company did not own it, the authorities are clear that plaintiff, by allowing Jones Company to come upon his property, set up a mill and cut timber, is now estopped to assert title against defendant. There is no question but that defendant was a bona fide purchaser; that plaintiff in signing the agreement of August 2, 1948, knew Jones Company was going to take possession of the timberlands and sell lumber cut from the property, and that it was doing so and selling to defendant between August 2nd and October 8th. Assuming, under his theory, that plaintiff was the rightful owner of the lumber cut, under the law he would still be estopped from subsequently asserting title. In *Wendling Lbr. Co.* vs. *Glenwood Lbr. Co.*, 54 Cal. App. 691, wherein plaintiff sold lumber to one Routt, a known dealer in lumber, and defendant without knowledge of the facts of the sale bought it from Routt, the court said at page 696: "These facts bring this within the rule that where the owner of a property clothes another with the apparent title to and power of disposition of it and an innocent

third party has thereby been induced to deal with the apparent owner in reference thereto, the true owner is estopped from afterwards asserting his title. (Citations)."

Furtner, in connection with estoppel, the evidence shows that plaintiff at no time advised defendant that Jones Company had no title to the lumber until after defendant's last transaction with it, when the lumber had been delivered and paid for in full.

For the foregoing reasons, the judgment is affirmed.

LILLIE, J.

We concur:

WHITE, P.J.
FOUR, J.

APPENDIX "C".

In the Superior Court of the State of California in and for the County of Los Angeles.

No. 589942

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THOMAS EISTRAT,

Plaintiff,

vs.

WESTERN HARDWOOD LUMBER COMPANY, *a corporation,*

Defendant.

The above entitled action came on regularly for trial before the Honorable Vernon W. Hunt, Judge of the above entitled Court, sitting in Department 27 thereof, on the 22nd day of August, 1956, a jury having been expressly waived in writing by the plaintiff, and trial thereof was continued on August 23, 1956 and August 24, 1956, plaintiff appearing in his own person and Wright, Wright, Green and Wright by Edgar R. Carver, Jr. appearing for the defendant, and evidence both oral and documentary having been introduced and the cause submitted for decision, the Court now makes its Findings of Fact as follows:

FINDINGS OF FACT

I

That each and all of the allegations set forth in paragraph I of the first cause of action of plaintiff's Third Amended Complaint are true.

II

That each and all of the allegations set forth in paragraph II of the first cause of action and paragraph II of the third cause of action of plaintiff's Third Amended Complaint are untrue, except those allegations of said paragraphs herein expressly found to be true, to wit: It is true that for many years prior to 1940 plaintiff was the owner in fee and that at all times thereafter plaintiff and his wife, Elma Eistrat, were and now are the owners in fee as community property of the real property described as the northwest quarter of Section 29, Township 24 south, Range 32 east, Mount Diablo Base and Meridian, in the county of Tulare, state of California.

III

That each and all of the allegations set forth in paragraph III of the first cause of action of plaintiff's Third Amended Complaint are untrue, except those allegations in said paragraph herein expressly found to be true, to wit: It is true that before the commencement of this action, namely on or about August 17, 1951, plaintiff demanded possession of certain lumber owned by defendant and defendant refused to deliver said lumber to plaintiff.

IV

That each and all of the allegations set forth in paragraph IV of the first cause of action of plaintiff's Third Amended Complaint are untrue.

V

That each and all of the allegations set forth in paragraph IV of the third cause of action of plaintiff's Third Amended Complaint are untrue.

In this connection the Court expressly finds that on or about August 18, 1948 the defendant loaned the sum of three thousand dollars ($3,000.00) to the Jones Lumber and Mill Company, to be repaid by the Jones Lumber and Mill Company to the defendant by loads of lumber.

Further in this connection the Court expressly finds that the defendant has not ever, or at all, directed, controlled or financed said Jones Lumber and Mill Company or Tom G. Jones, or Danny Jones, or Clovanell Jones, or anyone, or been a joint venturer or partner with the said Jones Lumber and Mill Company, or anyone, or connived with said Jones Lumber and Mill Company, or anyone, in connection with said real property, or any trespass thereon, or any logging or milling operations thereon, or the removal therefrom of any timber, logs or lumber, or any conversion thereof.

VI

That each and all of the allegations set forth in paragraph VIII of the third cause of action of plaintiff's Third Amended Complaint are untrue, except those allegations of said paragraph herein expressly found to be true, to wit: It is true that on or about August 2, 1948 plaintiff, on behalf of his wife and himself, entered into a certain Timber Sales Agreement with the Jones Lumber and Mill Company, a true copy of which said Timber Sales Agreement is annexed to the answer to said Third Amended Complaint as Exhibit "A".

In this connection the Court expressly finds that the plaintiff and his wife received a valuable consideration for the execution by plaintiff of said Timber Sales Agreement.

VII

That each and all of the allegations set forth in paragraph X of the third cause of action of plaintiff's Third Amended Complaint are untrue.

VIII

That each and all of the allegations set forth in paragraph XI of the third cause of action of plaintiff's Third Amended Complaint are true, except the following, to wit: It is not true that defendant at any time subsequent to August 6, 1948, or at all, ever was in possession of, or on, plaintiff's real property.

IX

That each and all of the allegations set forth in paragraph XII of the third cause of action of plaintiff's Third Amended Complaint are untrue, except those allegations of said paragraph herein expressly found to be true, to wit: It is true that on or about October 8, 1948 plaintiff gave to the Jones Lumber and Mill Company oral notice of the termination of the said Timber Sales Agreement and that on or about October 11, 1948 plaintiff gave written notice of said termination to said Jones Lumber and Mill Company.

X

That each and all of the allegations set forth in paragraph XIII of the third cause of action of plaintiff's Third Amended Complaint are untrue.

In this connection the Court expressly finds that at no time prior to the month of November 1948 did plaintiff notify defendant, orally or otherwise, that plaintiff claimed that the Jones Lumber and Mill Company at no time had any right, title or interest in or to any

lumber made from timber cut from plaintiff's real property and had no right to be on plaintiff's land.

XI

That each and all of the allegations set forth in paragraphs XIV, XV, XVI, XVII, XVIII, XIX and XX of the third cause of action of plaintiff's Third Amended Complaint are untrue.

In this connection the Court expressly finds that between August 18, 1948 to October 22, 1948 the said Jones Lumber and Mill Company sold and delivered to the defendant Western Hardwood Lumber Company approximately 86,958 board feet of lumber.

Further in this connection the Court expressly finds that the said Jones Lumber and Mill Company had title to said lumber and were the owners thereof and that the plaintiff and the said Elma Eistrat did not at any time subsequent to August 2, 1948, and do not now have, nor did either of them have at any time subsequent to August 2, 1948, nor now have, any right, title or interest in or to said lumber, or any part thereof.

Further in this connection the Court expressly finds that the defendant between August 18, 1948 and October 25, 1948 paid to the said Jones Lumber and Mill Company about sixty-five hundred dollars ($6,500.00) for said lumber and that such payments constituted payment in full for said lumber.

XII

That each and all of the allegations set forth in paragraph XXIII of the third cause of action of plaintiff's Third Amended Complaint are untrue, except

those allegations in said paragraph herein expressly found to be true, to wit: It is true that on or about June 24, 1949 Tom G. Jones instituted that certain action entitled *In the Matter of Tom G. Jones*, No. 6688 in bankruptcy in the United States District Court for the Southern District of California, Northern Division; that plaintiff filed therein a petition to reclaim said real property and that on or about October 1, 1951 said United States District Court granted said petition and entered its order binding said Tom G. Jones and the partnership known as the Jones Lumber and Mill Company and adjudging that all lumber transferred by said Tom G. Jones or said partnership to any or all persons after August 26, 1948 came from plaintiff's aforesaid real property.

In this connection the Court expressly finds that said United States District Court in its findings in support of said order entered on October 1, 1951, among other things, declares that any default in the performance of the terms and conditions of said Timber Sales Agreement (hereinabove referred to) were waived by Thomas Eistrat and Elma Eistrat by acceptance of payments for and on account of lumber cut and logged by the partnership and the bankrupt, with knowledge of the delinquency of the partnership and the bankrupt in performance of said provisions, with the exception of those provisions relating to compliance with the forestry rules with respect to fire hazards.

Further in this connection the Court expressly finds that between September 4, 1948 and December 3, 1948 the plaintiff, on behalf of himself and his wife, accepted, endorsed and cashed checks of the Jones Lum-

ber and Mill Company in the total sum of three thousand six hundred seventy-three dollars and forty cents ($3,673.40) as payments for and on account of lumber cut and logged by the Jones Lumber and Mill Company between August 2, 1948 and December 3, 1948.

Further in this connection the Court finds that plaintiff affirmed title in the Jones Lumber and Mill Company as to all timber cut by the said Jones Lumber and Mill Company on plaintiff's said real property prior to December 9, 1948 by instituting a suit on said date in the Tulare County Superior Court in the name of his wife, Elma Eistrat, who was then the record owner of said property, in which action plaintiff and his wife acknowledged receipt of certain payments on account of timber cut and logged under said Timber Sales Agreement of August 2, 1948 and in which said suit plaintiff and his wife sought to recover a balance allegedly due for timber cut and logged under said Timber Sales Agreement.

Further in this connection the Court expressly finds that it is true that the United States District Court, Southern District of California, Northern Division, in its said order entered October 1, 1951 on Petition for Review of Order of Referee, No. 6688 in bankruptcy, among other things, ordered, adjudged and decreed that neither the trustee not the receiver therein, nor the Jones Lumber and Mill Company partnership, nor the bankrupt Tom G. Jones had any present right, title or interest in or to any claim against anyone for the value of the logs or lumber removed from said real property, and that such claim or claims as may exist, if any, were the property of Thomas Eistrat and Elma Eistrat.

Further in this connection the Court expressly finds that plaintiff and the said Elma Eistrat have not, nor has either of them, any claim or claims against the defendant for the value of logs or lumber removed from the said real property of plaintiff and the said Elma Eistrat, nor does the plaintiff and the said Elma Eistrat, or either of them, have any claim or claims against the defendant of any kind or nature.

XIII

That it is not true that the defendant at any time agreed orally with the plaintiff or otherwise, or at all, to be bound by any judgment binding the Jones Lumber and Mill Company and Tom G. Jones in said United States District Court bankruptcy proceeding as to the title to any lumber derived from plaintiff's property and obtained by defendant.

XIV

That it is not true as alleged in paragraph XXV of the third cause of action of plaintiff's Third Amended Complaint that plaintiff was restrained and enjoined by the order of said United States District Court from maintaining any suits in any California state courts against anyone affecting lumber removed from said real property.

In this connection the Court expressly finds that said United States District Court at no time enjoined plaintiff from instituting and maintaining any suit involving said lumber against defendant.

XV

That each and all of the allegations set forth in paragraph XXVII of the third cause of action of plaintiff's Third Amended Complaint are true.

In this connection the Court expressly finds that plaintiff had no right, title or interest in or to said lumber; that said defendant was the owner of said lumber, and refused and had the right to refuse to deliver said lumber, or any part thereof, to plaintiff.

XVI

That each and all of the allegations set forth in paragraphs XXIX, XXX, XXXI, XXXII and XXXIII are untrue.

XVII

That each and all of the allegations set forth in the sixth affirmative defense in defendant's Answer to plaintiff's Third Amended Complaint are true.

XVIII

That each and all of the allegations set forth in the ninth affirmative defense in defendant's Answer to plaintiff's Third Amended Complaint are true.

CONCLUSIONS OF LAW

I

That the plaintiff is not entitled to recover anything from the defendant on the Third Amended Complaint herein.

II

That defendant is entitled to judgment for its costs and disbursements incurred or expended herein.

Let judgment be entered accordingly.

Dated this 12th day of September, 1956.

VERNON W. HUNT
Judge of the Superior Court

APPENDIX "D".
(R.T. 151, 153, PL. Ex. 6, 8)

In the United States District Court, Southern District of California, Northern Division.

No. 6688 In Bankruptcy

ORDER ON PETITION for Review of Order of Referee dated October 21, 1951.

In the Matter of TOM G. JONES, also known as TOM JONES, doing business as JONES LUMBER & MILL COMPANY, Bankrupt.

Judgment Docketed and Entered October 1, 1951. Edmund L. Smith, Clerk. By C. A. Simmons, Deputy Clerk.

Filed September 27, 1951. Edmund L. Smith, Clerk. By E. W. Eiland, Deputy Clerk.

A True Copy, Attest, etc. October 5, 1951. Edmund L. Smith, Clerk U. S. District Court. Southern District of California. By Philip H. Harris, Deputy.

(Seal)

THOMAS EISTRAT and ELMA EISTRAT having filed a petition for review of order of Referee herein, dated October 21, 1950, and having thereafter filed a motion for an order requiring the bankrupt herein and JONES LUMBER & MILL COMPANY, a co-partnership composed of TOM JONES, DANNY R. JONES and CLOVIS JONES, to be bound by such order or orders as the Court might make in respect to said petition for review, said THOMAS EISTRAT and ELMA EISTRAT appearing in their own persons, the Trustee and Receiver herein, VINCENT P.

DI GIORGIO, appearing by KENNETH H. BATES, of Deadrich, Gill & Bates, the bankrupt and said partnership JONES LUMBER & MILL COMPANY appearing by ROLAND S. WOODRUFF, and the COURT having considered the proceedings had before the Referee and having received further evidence, and having made its written Findings of Fact and Conclusions of Law, and ordered that an order be entered herein in accordance therewith, now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

I

That VINCENT DI GIORGIO, Receiver and Trustee herein, the bankrupt herein, TOM G. JONES, also known as TOM JONES, doing business as JONES LUMBER AND MILL COMPANY, a co-partnership composed of TOM JONES, DANNY R. JONES and CLOVIS JONES, and each of them, has no right, title, interest, claim, lien or right to possession in, to or against the following described real property, to-wit:

> The North West Quarter, Section 29, Township 24 South, Range 32 East, Mt. Diablo Base Meridian, also sometimes known as the Eistrat property

or any part thereof, or logs, lumber or timber thereon or any part thereof or in or to any of the logs, timber or lumber removed from said real property.

II

That the said THOMAS EISTRAT and ELMA EISTRAT are the owners of said real property and all of the logs, timber and lumber thereon and entitled to immediate possession thereof.

III

That the Trustee herein forthwith deliver over to said THOMAS EISTRAT and ELMA EISTRAT possession of said real property and the logs, lumber and timber thereon.

IV

That the Trustee herein, VINCENT P. DI GIORGIO, deliver to said THOMAS EISTRAT and ELMA EISTRAT the sum of $1,381.64.

V

That neither the Trustee herein, nor the Receiver herein, nor said partnership, nor said bankrupt, has any present right, title or interest in or to any claim against BRUSH INDUSTRIAL LUMBER CO., SUNSET CABINET SHOP, or any present claim against any other person or persons for the value of logs or lumber removed from said real property, and such claim or claims as may exist, if any, are the property of said THOMAS EISTRAT and ELMA EISTRAT.

VI

That VINCENT P. DI GIORGIO as Trustee of the Estate of TOM G. JONES, also known as TOM JONES, doing business as JONES LUMBER & MILL COMPANY, Bankrupt, is the owner and entitled to the possession of the mill and machinery of the said bankrupt located upon the real property described as:

The North West Quarter, Section 29, Township 24 South, Range 32 East, Mt. Diablo Base Meridian, County of Tulare, State of California, also sometimes known as the Eistrat property.

VII

Any and all restraining orders, including among others, an order made by William A. McGugin, Referee herein, on or about June 24, 1949, an order made herein by Honorable Leon R. Yankwich on or about July 15, 1949, an order made herein by Honorable Campbell E. Beaumont, Judge herein, on or about April 25, 1951, in so far as said orders or any of them restrain THOMAS EISTRAT, ELMA EISTRAT, or either of them, are hereby dismissed and discharged, subject to the right of the bankrupt herein to invoke the injunctive power of this Court to restrain any action in personam against the bankrupt abiding the granting or denial of a discharge of the bankrupt.

DONE IN OPEN COURT THIS 27TH DAY OF SEPTEMBER, 1951.

C. E. BEAUMONT
Judge of the District Court
of the United States.

In the United States District Court, Southern District of California, Northern Division.

No. 6688 In Bankruptcy

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In the Matter of TOM G. JONES, also known as TOM JONES, doing business as JONES LUMBER & MILL COMPANY, Bankrupt.

(Seal)

A True Copy, Attest, etc. October 5, 1951. Edmund L. Smith, Clerk U.S. District Court. Southern District of California. By Philip H. Harris, Deputy.

Filed, September 27, 1951. Edmund L. Smith, Clerk. By E. W. Eiland, Deputy Clerk.

THOMAS EISTRAT and ELMA EISTRAT, husband and wife, hereinafter sometimes referred to as petitioners, having filed a petition for review of that certain order of the Referee in Bankruptcy herein, dated October 21, 1950, in respect to the rights of the petitioners in and to certain real property described as:

> The North West Quarter, Section 29, Township 24 South, Range 32 East, Mt. Diablo Base & Meridian, also sometimes known as the Eistrat Property

and in and to the timber and logs and lumber made from timber on said property, and the petitioners having made a motion for an order that the bankrupt herein and JONES LUMBER & MILL COMPANY, a co-partnership composed of TOM JONES, DANNY R. JONES and CLOVIS JONES, be bound by such orders as the Court might make in connection with said petition for review, said THOMAS EISTRAT and ELMA EISTRAT appearing in their own persons, VINCENT P. DI GIORGIO, a receiver and trustee herein, appearing by KENNETH H. BATES of DEADRICH, GILL & BATES, and the bankrupt and said partnership appearing by ROLAND S. WOODRUFF, and the Court having considered the evidence and proceedings had before the referee in Bankruptcy, and having heard and received additional evidence presented by the parties before this Court, and having considered the arguments of the respective parties made in person or by counsel, and the Court having granted said motion that the bankrupt herein and

JONES LUMBER & MILL COMPANY, a co-partnership composed of TOM JONES, DANNY R. JONES and CLOVIS JONES, be bound by such orders as the Court might make in connection with said petition for review, and the petitioners having withdrawn their objection to the jurisdiction of the Court (in respect to which thereafter a written consent to the jurisdiction of the Court was filed by the petitioners), and the matter having been submitted to the Court for its Findings of Fact, Conclusions of Law and Orders, now, therefore, the Court makes its Findings of Fact and Conclusions of Law as follows, same to be in lieu and in place of the Findings of Fact and Conclusions of Law made by the Referee in Bankruptcy in connection with said order dated October 21, 1950, to-wit:

FINDINGS OF FACT

I

That on or about July 22, 1949, THOMAS EISTRAT, acting on behalf of himself and his wife, ELMA EISTRAT, entered into a certain agreement with JONES LUMBER & MILL COMPANY, a co-partnership consisting of TOM JONES, DANNY R. JONES and CLOVIS JONES, to sell certain timber located on the above described real property being the

> North West Quarter, Section 29, Township 24 South, Range 32 East, Mt. Diablo Base & Meridian, also sometimes known as the Eistrat Property, in Tulare County, State of California.

II

That on or about August 2, 1948, the parties to said agreement of July 22, 1948, by mutual consent can-

celled said agreement and entered into the following agreement:

"TIMBER SALES AGREEMENT

ONE: We, Tom Jones, Danny R. Jones and Clovis Jones, a partnership doing business under the firm's name of Jones Lumber and Mill Company, having office and principal place of business at Glennville, Kern County, California, hereinafter called the Purchaser, hereby agree to purchase from an area of about 160 acres all merchantable timber twenty-two inches or over in diameter (breast high), including pine, fir, or cedar in accordance with the following terms of this contract from Thomas Eistrat, hereinafter called the Seller. The land is described as follows, to-wit:

The North West Quarter Section 29, Township 24 South, Range 32 East, Mt. Diablo Meridian, California.

TWO: The Purchaser agrees to pay the Seller Eight Dollars and Fifty Cents ($8.50) for each thousand board feet of merchantable timber on said tract. Payment to be made by Purchaser to Seller at places of his designation each week for all timber cut (logged) the preceding week. Purchaser agrees to cut and pay for all merchantable timber before October 1, 1950. Time is of the essence for the cutting and payment provisions. Purchaser agrees that no title or ownership of any timber shall pass from Seller until after the timber is cut. Purchaser authorizes examination of his records and accounts by Seller at any time for purpose of check on payments due.

THREE: It is agreed that the Scribner Decimal C Log Scale shall be used to determine the footage of all timber cut. Seller is to be paid on the same amount of footage on which the Purchaser pays his independent contractors in his logging operation.

FOUR: Purchaser is to comply with all California State Laws and California State and U S Forestry Rules and regulations pertaining to logging. All necessary clean up and fire protection shall be at the purchaser's expense.

FIVE: Purchaser is not to encumber or remove his milling and logging equipment from Seller's land without prior approval of Seller until all timber on said 160 acres is paid for.

SIX: Purchaser agrees to indemnify Seller for all damages or claims arising out of any of Purchaser's operations on said 160 acres. It is understood and agreed that Purchaser is an independent contractor and the Seller is only concerned with the end and not the means.

SEVEN: Fire damage does not excuse performance of this contract.

EIGHT: For the purpose of cutting down and removing said timber, the Purchaser shall have full license and liberty to enter upon said land and build roads and all other necessary improvements for the logging of the timber included in this agreement.

NINE: The Purchaser and Seller expressly rescind the agreement between them dated July 22, 1948.

TEN: The Purchaser hereby agrees to purchase and the Seller agrees to sell the merchantable timber in accordance with the terms and conditions herein stated. Purchaser to commence logging immediately.

Signed in quadruplicate this 2nd day of August, 1948, At Monterey Park, California.

TOM JONES, *Purchaser*
THOMAS EISTRAT, *Seller*
238 Riggin Avenue
Monterey Park, California
Telephone UNion 1-6017

ELEVEN: It is further agreed that should purchaser fail to cut and pay for timber as required, that Purchaser shall have no right to continue cutting without prior written authorization from the Seller."

III

Said agreement of August 2, 1948, was executed by THOMAS EISTRAT on behalf of himself and his wife, ELMA EISTRAT.

IV

The said partnership entered said property on or about August 6, 1948, moved a small mill to the property and proceeded to cut lumber thereon.

The partnership failed to comply with the provisions of the California Natural Resources Code and with an ordinance of the County of Tulare, State of California, regarding fire hazards, and failed to comply with vailing fire rules and regulations of the U S Forestry Service pertaining to logging; and that at all times af-

ter the first week in August, 1948, there has been a continuing violation of the said fire laws and with the regulations of the U S Forestry Service pertaining to logging in that:

a) On said property after the first week in August, 1948, were certain dead snags which constituted a serious fire hazard, but none of said snags were felled;

b) That the partnership in the course of its milling and logging operations, commenced about August 6, 1948, accumulated on said property waste material, slashings, sawdust and other mill refuse, none of which was ever burned or otherwise disposed of. That same constituted a serious fire hazard;

c) That the partnership failed to pile or burn brush, resulting from logging operations by it, along the ridges and along the roads for a distance of one hundred feet on each side. That same constituted a serious fire hazard.

V

That any default in performance of the terms and conditions of said agreement by the partnership and the bankrupt, except compliance with the terms and provisions of paragraph FOUR thereof, were waived by THOMAS EISTRAT and ELMA EISTRAT by acceptance of payments for and on account of lumber cut and logged by the partnership and the bankrupt, with knowledge of the delinquency of the partnership and the bankrupt in performance of said agreement.

VI

On or about October 10, 1948, the Eistrats served the partnership a written notice of termination of said agreement. On December 9, 1948, suit was filed by the Eistrats in the Superior Court of the State of Califor-

nia, in and for the County of Tulare, being action No. 38263, for the purpose of obtaining a judgment that said agreement had been terminated and of quieting title to the property and for the recovery of certain monies. Notice of lis pendens was filed in the office of the County Recorder of Tulare County on June 14, 1949. A trial of said action has not been had and said action is still pending.

VII

On or about June 21, 1949, the partnership assigned all of its assets to said TOM JONES, a member of said partnership. On June 24, 1949, TOM JONES commenced the proceedings herein by filing a petition for an arrangement under Chapter XI of the Bankruptcy Act. On or about September 9, 1949, VINCENT P. DI GIORGIO was appointed and became the duly qualified and acting Receiver in these bankruptcy proceedings and placed in charge of the assets of the estate. On or about October 30, 1949, said TOM JONES was adjudged bankrupt herein. In February, 1950, said VINCENT P. DI GIORGIO became the duly appointed, qualified and acting Trustee herein.

In the course of these proceedings, said TOM JONES logged and milled in excess of 263,360 board feet of timber obtained from said real property. A portion of such timber was sold by said DI GIORGIO as Trustee or Receiver herein. The proceeds thereof actually collected by said DI GIORGIO amounts to the sum of $1,381.64 and is now in his possession as Trustee in Bankruptcy herein. The said Trustee in Bankruptcy also has in his possession a certain account receivable resulting from his sale of a portion of said timber sold to SUNSET CABINET SHOP. In addition there appears to be owing by BRUSH INDUSTRIAL LUM-

BER CO. a sum representing the value of said lumber delivered by the partnership in 1948 which sum is under levy of attachment procured by ELMA EISTRAT in the above numbered action No. 38263, in the Superior Court of the State of California, in and for the County of Tulare.

VIII

All lumber sold or delivered after August 26, 1948, by either the partnership, the bankrupt, the receiver or trustee herein was cut and removed from said real property. BASED UPON THE FINDINGS OF FACT, THE COURT MAKES ITS CONCLUSIONS OF LAW AS FOLLOWS:

CONCLUSIONS OF LAW

I

That there has been a continuing violation since the first week of August, 1948, successively by the partnership, TOM G. JONES, the Receiver and the Trustee of provisions of paragraph "FOUR" of said agreement dated August 2, 1948.

II

That all rights of said partnership under said agreement of August 2, 1948, were terminated on October 10, 1948.

III

That neither said partnership, said TOM JONES, the bankrupt herein, the Receiver nor the Trustee herein has any right, title, interest, claim or lien in, to or against said real property, to-wit:

The North West Quarter, Section 29, Township 24 South, Range 32 East, Mt. Diablo Base Meri-

dian, County of Tulare, State of California, also sometimes known as the Eistrat property

or any of the logs, lumber or timber located thereon or removed from said real property.

IV

That said partnership should be and is bound by the proceedings herein had.

V

That the Trustee should deliver over to the petitioners all of the said real property, logs, lumber and timber located thereon, the sum of $1,381.64 now in possession of the Trustee herein, any claim or claims the trustee has against any other person or persons, including among others, if any, SUNSET CABINET SHOP and BRUSH INDUSTRIAL LUMBER CO., arising from transfer or delivery of logs or lumber felled on said real property, same to be without prejudice to such right or rights as the petitioners may have against such person or persons or any of them.

VI

That the Trustee is the owner of said mill but same should be removed from said real property within a period of ninety (90) days from date. Otherwise, same shall be deemed to be part of said real property and to have been abandoned by the Trustee.

LET AN ORDER BE ENTERED ACCORDINGLY.

Dated: This 26th day of September, 1951.

C. E. BEAUMONT
Judge of the District Court of the United States

APPENDIX "E".

FEDERAL COURT'S OPINION

"I say the fire hazard has been one of the things that constantly has stared the court in the face throughout these proceedings, and, as you know and as I have heretofore stated, I think there was a waiver of the breaches of the Timber Sales Agreement, except in one respect, and that had to do with the question of compliance with the Federal and State Laws. In that respect I think there was no waiver and could be no waiver, because of the public interest in it." (Excerpt from remarks of Judge Beaumont, Fresno, California, September 26, 1951, 10:00 a.m.)

"In my opinion, as I stated, there is a waiver of the breaches that occurred, by the acceptance of the payments, except in one respect, and in that one respect, as I stated heretofore, it is, in my opinion, a matter that would be contrary to public policy to permit a waiver of the requirement that they protect this property from the fire hazard. It was a continuing violation, as I said heretofore, and it would be contrary to public policy to attempt to enforce any contract made contrary to the direct provisions of the law; and it is my belief, my opinion,—and I so held—that it is contrary to such provisions to permit a waiver under the circumstances of this case. The fire matter is too important, and the public interest in the protection of the forest is too great, and is paramount to the rights of the parties that they might have in an ordinary contract.

"In an ordinary contract, there could be a waiver of a provision of the contract by the conduct of a party;

but here, in my opinion, there could be none. I am thoroughly convinced that it would be contrary to public policy to permit such waiver, and although it does inure to your benefit, still you are merely, you might say, the recipient of the benefit which comes directly from the public interest. It is to the public interest to take all proper precautions to prevent fires.

"When a contract is entered into and there is a law upon the particular subject, it is incorporated in the contract; but, in addition to that, the parties hereto went further and they provided that there shall be a compliance with all the State Laws and the State and Federal regulations for the protection of the forest, and this was not done.

"The Natural Resources code provides that a violation for each day, and this was a continuing violation, and that is the basis of the Court's judgment.

. . . .

"If I weren't so thoroughly of the opinion that that was a most important matter and one in which the public interest is so great, I probably would have reached the same conclusion Mr. McGugin did, that you waived any breach; but I do not think you could, and I do not think that the Trustee should be heard to claim there was a waiver. I am sorry Mr. Bates is not here when I make that statement, but I feel very strongly about it.

"Fires in California are so great, and the damage is so terrible and devastating, that the Court takes judicial notice of the annual danger of fires unless proper precautions are taken to prevent the start and the spread of fires. And as I said before, each time this question of fire came up, it would be staring me right

in the face. The only time I felt relieved at all was when these matters came up in the winter time and I felt there was no particular danger. Otherwise they were always before me.

"I was glad when arrangement was made some months ago so you could go in there and protect the property, and I am very glad the present arrangement is being made so you can have your man go in there now and clean up." (Excerpts from remarks of Judge Beaumont, Fresno, California, Wednesday, September 26, 1951, 2:30 p.m.)

"Courts will not enforce an agreement in contravention of a provision of law. It would be against public policy to do so. In my opinion, the courts will not permit the waiver of an express provision in a contract to fulfill a statutory requirement enacted for the protection of our natural resources. To do so likewise would be against public policy. To permit such waiver would permit parties to do by indirection that which they could not do directly. In my view, this is what is sought to be done in this proceeding when the Trustee, an officer appointed by the Bankruptcy Court claims that Mr. and Mrs. Eistrat waived performance of Paragraph IV of the timber sales agreement by the acceptance of payments under the circumstances shown by the evidence. There was no doubt a waiver of failure of performance of certain provisions made solely for the benefit of the parties themselves, but there it ends. It may not be permitted to affect the public's interest in having the forests of the state protected from the starting and spreading of fires." (Excerpt from remarks of Judge Beaumont, Fresno, California, Wednesday, October 10, 1952, 10:00 a.m.)

APPENDIX "F".
(50 A. C. 222)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA IN BANK
L.A. 24915

THOMAS EISTRAT

Plaintiff and Appellant,

vs.

KARL A. CEKADA,

Defendant and Respondent.

Filed May 9, 1958, WILLIAM I. SULLIVAN, Clerk.

By.....
S. F. Deputy

This is an appeal from a judgment for the defendant in an action for damages for the conversion of lumber taken from the plaintiff's property in Tulare County. The trial court held that the action was barred by the statute of limitations and the propriety of that ruling is the principal question for determination on the appeal.

On June 24, 1949, one Tom G. Jones filed a petition in bankruptcy in the United States District Court under chapter XI of the Bankruptcy Act. He claimed title to certain lumber and the right to operate a sawmill on the plaintiff's property free from interference by the plaintiff. He obtained an order from the referee in bankruptcy which provided as follows: "[A]ll persons be, and they hereby are, enjoined and stayed until final decree herein, from commencing or continuing any suit against Tom G. Jones, doing business as Jones Mill and Lumber Company, the above named debtor

and the said Thomas Eistrat is further restrained and enjoined from interfering with the debtor in the possession of his property and in the operation of the debtor's mill and lumber business."

On July 15, 1949, the plaintiff's motion to dissolve the restraining order was denied but a surety bond was ordered in the plaintiff's favor to indemnify him against loss from the operations of the debtor.

On September 29, 1949, the plaintiff, joined by his wife Elma, filed a petition in the bankruptcy proceeding to reclaim the property here involved. Final action on that petition was postponed. In November 1949 the defendant Cekada paid the receiver in bankruptcy $588 for whatever, right, title or interest the receiver had therein and took possession of the lumber in question. On April 25, 1951, the court again denied a motion by the plaintiff to dissolve the restraining order but did order the dissolution of that portion of the restraining order which related specifically to the plaintiff's interference with the possession of the real property and the operation of the mill and lumber business thereon. Finally, on October 1, 1951, the plaintiff's petition to reclaim the property was granted and the restraining order dissolved in its entirety.

In making its order of October 1, 1951, granting the petition to reclaim and dissolve the restraining order, the bankruptcy court made findings from which it concluded that neither Tom Jones, the receiver in bankruptcy nor the trustee had any right, title or interest in the real property of the plaintiff or in "any of the logs, lumber or timber located thereon or removed from said real property"; that the trustee should deliver over to the plaintiff all proceeds from

the sale of the lumber, "without prejudice to such right or rights as the [plaintiff] may have against such person or persons or any of them."

On November 28, 1951, after the dissolution of the restraining order, the plaintiff made a demand on the defendant for the return of the lumber. The demand was refused on December 10, 1951. The present action was commenced on September 30, 1954, which was within three years from and after the dissolution of the restraining order and of the demand and refusal.

The defendant's answer pleaded the three year statute of limitations provided for in section 338, subdivision 3, of the Code of Civil Procedure. The trial court concluded that the restraining order issued in the bankruptcy proceedings merely restrained the plaintiff from commencing any action against the bankrupt Jones, and did not prevent the plaintiff from commencing an action against the defendant Cekada or against anyone other than the bankrupt. The court found and concluded that the defendant purchased the lumber in question from the bankrupt's estate on November 22, 1949, and that the plaintiff's cause of action arose on that date; that the plaintiff had knowledge thereof about December 1, 1949, and that the complaint filed on September 30, 1954, was barred by the three year statute of limitations.

It is the general rule that such a cause of action accrues immediately upon the commission of the act of conversion. (*Bell v. Bank of California*, 153 Cal. 234; *Rose v. Bunk-Harbison Co.*, 7 Cal. App. 2d 502, 505-506.) Normally the statute of limitations begins to run at that time. (*Dillon v. Board of Pension Commrs.*, 18 Cal. 2d 427, 430.) However, the running of the

statute is suspended during any period in which the plaintiff is legally restrained from taking action to protect his interests. (*Code Civ. Proc.*, § 356; *Wolf v. Gall*, 174 Cal. 140, 145.)

Upon the filing of a petition in bankruptcy the bankruptcy court acquires exclusive jurisdiction over the bankrupt and his estate and may restrain any suit to recover a debt which might be dischargeable therein. (*Ex parte Baldwin*, 291 U.S. 610; *Jones v. Alton & S.R. Co.*, 5 Fed. Supp. 532.) In the present case the restraining order as above set forth prohibited all persons from commencing "any suit against Tom G. Jones" and further restrained the plaintiff specifically "from interfering with the debtor in the possession of his property . . ." The intent of the first portion of the order is clear but the meaning of that portion which in broad general terms prohibited the plaintiff "from interfering with the debtor in the possession of his property" is not so explicit. However, in keeping with the power and purpose of the court to stay collateral proceedings in other courts pending the outcome in bankruptcy, it should be assumed that under the order the court would not condone the commencement of an action by the plaintiff against the receiver. It should also be assumed that the court intended that the commencement of any suit against an assignee of the receiver, in the discharge of his duties in bankruptcy, would constitute an interference with the debtor in the possession of his property. Just what conduct on the part of the plaintiff would constitute the prohibited interference is not as certain as it should be. But it is sufficiently certain to put the plaintiff on notice that a lawsuit against the bankrupt or anyone coming into possession of the bankrupt's assets in due course of

the bankruptcy proceedings would be undertaken at the peril of probable sanctions for contempt. The plaintiff asserts that the several federal judges who presided at the various hearings in the bankruptcy proceedings construed the restraining order as preventing him from commencing an action while the order was in effect. He offered to prove at the trial of the present action that by resorting to the record in the bankruptcy proceedings he could conclusively demonstrate that he was prohibited from commencing the present action against the defendant Cekada until the restraining order should be dissolved.

The defendant contends that the second portion of the restraining order relates only to physical interference with the debtor's possession of the property involved, and that the order of April 25, 1951, removed all physical restraint. That order provided that the restraining order "be and it hereby is dissolved insofar as it restrains or enjoins the said Thomas Eistrat from interfering with the debtor-bankrupt in the possession of the real property in the County of Tulare, State of California, and insofar as it restrains or enjoins Thomas Eistrat or Elma Eistrat from entering upon the said real property or interfering with the operation of the debtor-bankrupt's mill and lumber business on said real property." It is obvious that the order of partial dissolution did not remove all restraints imposed upon the plaintiff, but only those relating to the realty in Tulare County and to the operation of the sawmill located thereon. It did not allow the plaintiff generally to interfere "with the debtor in the possession of his property" as prohibited by the original order. The fact that it continued other restraints in effect could reasonably lead to the conclusion that those

restraints were other than those relating to mere physical possession. In any event the order of April 25, 1951, served to make the meaning of the basic order all the more uncertain.

The plaintiff's offer of proof from the record in the bankruptcy proceeding as to the interpretation and application of the restraining order in that proceeding was rejected on the ground that the order was clear and unambiguous on its face and that it did not require a reference to extrinsic evidence to determine its meaning. The plaintiff claims that the court's refusal to admit his evidence was prejudicially erroneous. This contention must be sustained.

Finally, the plaintiff contends that the defendant failed to comply with statutory procedures in filing his cost bill. Since the judgment must be reversed the order for costs will likewise stand reversed. The item of costs on trial will therefore await a further determination in the case.

The judgment is reversed.

SHENK, J.

WE CONCUR:

GIBSON, C.J.
CARTER, J.
TRAYNOR, J.
SCHAUER, J.
SPENCE, J.
McCOMB, J.

APPENDIX "G".

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

No. 6688 ND In Bankruptcy

JUDGMENT

THOMAS EISTRAT and ELMA EISTRAT,
Claimants,

vs.

MASSACHUSETTS BONDING & INSURANCE COMPANY, as SURETY FOR TOM G. JONES, ETC., BANKRUPT.

FILED February 1, 1954, EDMUND L. SMITH, Clerk; By ....., Deputy Clerk.

JUDGMENT Docketed and Entered February 3, 1954. EDMUND L. SMITH, Clerk; By Charles A. Heitz, Deputy Clerk.

The claimants having prevailed in their petition to reclaim property as by decree and order of the court entered on October 1, 1951 decreeing that the bankrupt had no right, title or interest in or to the property described in said petition to reclaim property, and the motion for summary judgment of claimants against the surety Massachusetts Bonding & Insurance Company having by consent of all parties been converted into a claim for relief against the bonding company, and the court having by its opinion and order for

judgment dated January 19, 1954 concluded that claimants have been damaged in the amount of $500.00 and that they should recover their costs.

Now, therefore it is ordered, adjudged and decreed that claimants Thomas Eistrat and Elma Eistrat have and recover from the surety Massachusetts Bonding & Insurance Company their damages in the amount of $500.00, together with their costs taxed in the amount of $493.70.

DONE IN OPEN COURT THIS 1st DAY OF FEBRUARY, 1954.

C. E. BEAUMONT, Judge

Approved as to form
DUSTIN N. JAMESON,
Attorney for Massachusetts
Bonding & Insurance Company.

APPENDIX "H"

Detailed Statement of Facts

On July 22, 1948 petitioner made a contract to sell some of the timber growing on his virgin land in Tulare County to one Jones partnership (hereafter called Jones) without having any previous knowledge concerning it, and with no entry to be made until the following year, and without any consideration except a promise to perform.

By mutual agreement that July 22, 1948 contract was expressly rescinded by a new contract in writing made August 2, 1948, the condition precedent of which provided that Jones had no right to cut any timber unless it complied with (1) all California State laws and California State and U.S. Forestry rules and regulations pertaining to logging, and (2) unless payment was made to petitioner each week for all timber cut (logged) the preceeding week. In addition there were covenants in the agreement requiring Jones to: (1) pay for clean-up and fire protection, (2) maintain records of the timber cut always available to petitioner so that petitioner would not have to scale the timber cut, and (3) pay petitioner for all damages and claims arising out of Jones' operations. The agreement further provided that no title to any timber cut would thereafter pass to Jones, should Jones fail to cut and pay for the timber as required.

Jones entered the land the first week of August, 1948, and then commenced cutting timber and moved in a small portable lumber mill. In August, 1948, respondent Western Hardwood, who had been doing business for more than a year with Jones, advanced Jones $3,000 for the purpose of installing a sawdust

and slash burner with knowledge that Jones did not own the timber and that it was unlawful for Jones to operate on the land without concurrent operation of the burner.

According to respondent's admissions in evidence, it's vice-president in charge of obtaining lumber was on petitioner's land for the purpose of seeing the sawdust burner in operation, knew prior to his visit the ranger insisted Jones get a burner, and found it caved in and not in operation, and was told by Jones that Jones did not own the timber (R.T. 168, Ex. 20, pages 6, 7, 16).

Respondent admits in evidence actual notice that Jones did not own the timber and thus respondent assumed the responsibility of finding out what title, if any, Jones had in the lumber it was transferring to respondent; and whether Jones had a California State license permitting it to cut or remove any of the timber products.

Petitioner, who lived 175 miles away from the land in Los Angeles County, accepted a check for $675.45 on September 3, 1948, in reasonable reliance upon Jones' statements that he truly accounted for all the timber cut and had not violated any of the California State laws or U.S. Forestry rules and regulations pertaining to logging and had not damaged the property. Between September 3, 1948 and October 5, 1948, petitioner received by mail and cashed two checks from Jones without any statement as to the operations and without any statement as to what account such money should be applied; and without knowledge as to the breaches of the conditions and covenant and laws by Jones.

On October 8, 1948, petitioner visited the land, found Jones had not accounted for the timber cut, had misrepresented to petitioner a mill tally as the scale of the timber cut, had never complied with the California State fire laws, had damaged the property, and never had any right to cut any of the timber under the agreement.

Respondent's answering brief in the state court correctly states that "prior to October 8, 1948, he had no reason to believe that the Jones Lumber and Mill Company was not complying with the agreement." Petitioner also found out on October 8, 1948 that the loggers, skidders, and mill workers had not been paid, were claiming Jones cheated them, and were quitting work. Petitioner immediately then ordered Jones off the land.

Petitioner gave written notice on October 10, 1948, to Jones that it was a trespasser and never acquired title to any of the logs cut. Offered in evidence (R.T. 192) and received in evidence (R.T. 193, Pl. Ex. 35) is that notice[1].

And further Tom Jones admitted under cross-examination that petitioner never withdrew the notice to Jones to get off the property after the first time it was given (R.T. 116, lines 16-22)[2].

Petitioner then finding that respondent Western Hardwood Lumber Company and Brush Industrial Lumber Company had been taking petitioner's lumber through Jones, immediately gave notice to both respondent and Brush that Jones had no title in the lumber shipped by Jones. Jones admitted under cross-examination that he received the original of such a

letter dated October 11, 1948 from Brush Industrial Lumber Company (R.T. 115, l. 10-14). The letter referred to[3] was offered in evidence (R.T. 114), received (R.T. 115, Pl. Ex. 2).

Footnote 1.

THOMAS EISTRAT
1020 S. Almansor Street
Alhambra, California

October 10, 1948

The Jones Lumber and Mill Company
a partnership of Tom Jones, Danny R. Jones
and Clovis Jones.

ATT: Mr. Tom Jones

Dear Sir:

You have failed to comply with the cutting and payment provisions of the contract we both signed for timber on the NW ¼ S 29, T 24 S, R 32 E. MDBM.

Since you failed to pay for the timber each week for all cut (logged) the preceding week and since you have no right to continue cutting without prior written authorization from me, which written authorization has not been made by me, you acquired no title to any of the logs cut after you breached the contract.

Further you have failed to comply with all the California State laws pertaining to logging as required by the terms of the contract.

You have no right to remain on the NW ¼ S 29, T 24 S, R 32 E and if you enter such land you are a trespasser.

As you should also know, you have no right to do any logging, or hauling or milling upon this land. You also know the effect of taking property that does not belong to you.

You also have no right to remove any of the milling or logging equipment you attached to or brought upon this land. However, depending upon your attitute and your payment of damages as I think proper, I may give you permission to remove your equipment from this land.

Very Truly yours,
/s/ Thomas Eistrat"

Footnote 2:

"Q. Did I at any time after October, after the first time I gave you notice to get off the property, withdraw such notice?

A. Repeat that, please.

THE COURT: Read the question, please. (Reporter read the question.)

A. I don't believe you did."

Petitioner on October 11, 1948 also informed respondent that Jones was a trespasser who had no title to the lumber respondent was receiving from Jones (R.T. 165, 166, Ex. 19, 69, 70).

On October 16, 1948, Jones telephoned petitioner and pleaded for another chance and admitted the past defaults, obtained a conference with petitioner's attorney and there represented no operations had occured on the land since October 8th, no further cutting would be done unless a new agreement were agreed upon, and removal of fire hazards and damages would be immediately done, and a true accounting and payment for all timber cut would be made. $2,100 was thereafter received upon Jones representations that no further cutting of timber had been done after Octo-

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Footnote 3:

"BRUSH INDUSTRIAL LUMBER CO.
WHOLESALE DISTRIBUTION YARD
4354 East Slauson, Telephone AG 1-1155
Los Angeles 22, California

October 11, 1948

Jones Lumber & Mill Company
Glennvile, California

Gentlemen:

This afternoon Mr. Eistrat came in and gave us a written notice, a copy of which is enclosed.

According to Mr. Eistrat you do not have title to the lumber which you are shipping us and he directs us not to make any further payments to you until this matter can be settled. Please investigate this immediately and let us have your reply. Also in making further shipments, please be guided by this notice. We don't know the merits of the case but we certainly want to be sure that we are in the clear when we pay you for the lumber.

May we hear from you promptly.

Yours very truly,
BRUSH INDUSTRIAL LUMBER CO.
By R. P. Kratz.

RPK/s
CC: Danny R. Jones
606 N. Poinsettia
Compton, California"

ber 8th, and the accounting was true and fire hazards and damages were being eliminated. Upon finding the accounting was materially untrue, and no new agreement being made, suit was filed in Tulare County on December 9, 1948.

Jones continued to cut petitioner's timber without his knowledge after October 8, 1948, thereafter transferring 120,000 board feet of lumber made therefrom to Brush and large quantities to respondent until prevented by snowfall at the end of November. Thereafter an attempted attachment in the Tulare County action was thwarted by prior attachments of a trucker and by Jones filing a voluntary proceeding under Chapter XI, Section 322 of the bankruptcy act, in the United States District Court on June 24, 1949.

Concurrent with filing the bankruptcy proceeding, Jones filed a statement of executory contracts, claiming he had title to all the timber on petitioner's land, had not defaulted in any way and that petitioner was interfering with the Jones business and preventing Jones from paying off his creditors from the profits he could make on the timber—and secured a restraining order preventing petitioner from suing Jones in the California State courts, or interfering with Jones cutting and taking petitioner's lumber.

In August 1949 petitioner's attorney filed a proof of claim for damages, and not for lumber or timber, in the bankruptcy court—and then on September 29, 1949, filed a petition to reclaim all the lumber, timber and logs on or removed from the land by Jones. On February 24, 1951 the withdrawal of the proof of claim was formally entered in the docket of the referee in bankruptcy, and at no time did petitioner ever par-

ticipate in any distribution of any assets of the bankrupt's estate (R.T. 153, 154, Pl. Ex. 9).

On October 1, 1951 the Honorable Campbell E. Beaumont, judge of the United States District Court, entered final judgment on review of the referee's order on petitioner's petition to reclaim property.

This federal judgment (Appendix D hereto, pages 28-40) decreed and adjudged that the bankrupt Jones, the partnership, the receiver and the trustee had no right to any of the logs, timber or lumber on or removed from petitioner's property, and that all claims for the value of the logs or lumber removed from the property are the property of petitioner and his wife.

The final federal judgment was supported by conclusions of law that Jones had no right to cut any timber at any time after commencement of first cutting in August 1948 based upon paragrahps II, IV and V of the findings. Paragraph IV found that Jones never complied with conditions precedent of the agreement in regard to the forst fire laws and paragraph V found these condtions were not waived.

A portion of findings V of the federal court stated that petitioner accepted payment for lumber with knowledge of the delinquency of Jones in the performance of the agreement. Petitioner, knowing this portion of the findings to be subject to misunderstanding, but favorable to the theory of the judgment did not file an appeal to clarify that incomplete finding as to payment. Petitioner relied upon the decisions heretofore of the United States Supreme Court and also the California State Supreme Court which deny the successful party a right to appeal for the purpose of changing findings not carried into a judgment, and

hold such findings are not adjudications against the party.

As stated by the California State Supreme Court in *Eistrat v Cekada*, 50 A.C. 222, 324 P 2d 881 (Appendix F-45 hereto), said federal court:

> "In making its order of October 1, 1951, granting the petition to reclaim and dissolve the restraining order, the bankruptcy court made findings from which it concluded that neither Tom Jones, the receiver in bankruptcy nor the trustee had any right, title or interest in the real property of the plaintiff or in 'any of the logs, lumber or timber located thereon or removed from said real property,' that the trustee should deliver over all proceeds from the sale of the lumber, 'without prejudice to such right or rights as the (plaintiff) may have against such person or persons or any of them.' "

The same federal judge again decreed in final order entered February 1, 1954 against the Massachusetts Bonding Company on petitioner's claim limited to damages for clean-up—caused by Jones' operations from July 15, 1949 to August 15, 1949 (the period of the bond) that:

> "The claimants having prevailed in their petition to reclaim property as by decree and order of the court entered on October 1, 1951, decreeing that the bankrupt had no right, title or interest in or to the property described in said petition to reclaim property." (R.T. 158, 159, Pl. Ex. 14—Appendix G, hereto, pages 50-52).

After respondent was told by Jones in August 1958,

he did not own the timber, respondent knowing it was being cut in violation of California State law, continued to take petitioner's lumber in 1948 until it had taken 133,207 board feet, of the then reasonable market value of $34,000—for which it gave Jones $3,000 for the sawdust and slash burner advancement, plus $1,050.19 upon unloading the lumber in Los Angeles, plus about $2,500 paid to the truckers.

After agreeing in September 1949 with petitioner to be bound by the adjudication of the bankruptcy court as to title to the lumber taken, respondent repudiated the agreement after the bankruptcy court rendered judgment to be prepared in petitioner's favor—and then respondent refused petitioner's demand for the return of the lumber and this action for conversion was filed within statutory period for conversion.

APPENDIX "I"

Detailed Statement of How the Federal Questions Were Timely and Properly Raised, And the Rulings Thereon by the State Courts

Petitioner's complaint for conversion as last amended stated that the title to the lumber involved was adjudicated by the federal court as being in petitioner, and not in Jones under whom respondent claimed title (C.T. 53, 61, 62, 63).

Respondent, over petitioner's objections, had the court try its defense of res adjudicata of the Brush case before petitioner was permitted to offer his case (R.T. 31). Respondent offered and had received in evidence the entire files of the Brush case, which included the clerk's and reporter's transcripts on appeal therein, together with exhibits (including the federal judgment and findings decreeing the Jones never had title to the lumber claimed through Jones by Brush and by respondent) (R.T. 31, 32).

Respondent immediately objected to that defense as being a collateral attack upon the federal judgment and a denial of due process and equal protection of law in contravention of the 14th Amendment of the United States Constitution, and a denial of full faith and credit to be afforded to federal judgment. Petitioner pointed out the federal judgment had just been received in evidence as an exhibit by reference in respondent's exhibit C, (R.T. 32-35). The objection was overruled by the court (R.T. 40).

After the court permitted extensive testimony by respondent's witness Jones, while restricting petitioner's cross-examination of Jones, the court led petitioner

to believe that all oral testimony on respondent's defenses was stricken, because the court stated:

> "THE COURT: Thus far I don't have any evidence before me that would constitute an adjudication yet.—In view of my ruling in this connection, Mr. Carver, if you have no other documentary evidence, I would think you would not be permitted to introduce oral evidence so that I can now make an adjudication. In fact, I am sure of that" (R.T. 133) — "Then the Court finds against you on that phase of the case at this time." (R.T. 134).

And the court, declining petitioner's offer to clarify matters, ordered petitioner to present his case on the issue of liability, as follows:

> "MR. EISTRAT: Now the defendant talked for about twenty minutes and made many statements, and his answers gave the Court many impressions that I think are erroneous. And I would like to have the opportunity to point some of those out.
>
> THE COURT: No, that isn't necessary. I have ruled against him on his question of res judicata. Now, the only thing for us to do is to proceed on the rest of the case, and, of course, on his other defenses. They will be presented after you present your own case, but I think that we will try the issue of liability first. We will take a short recess now, and then you will be prepared to put on your first witness as to the issue of liability (R.T. 136).

Petitioner would have liked to have pointed out that the reporter's transcript on appeal in the Brush case

received in evidence as part of defendant's B (and which is now on file with the Clerk of the United States Supreme Court in *Eistrat v. Brush Industrial Lumber Company*, No. 1074, October Term, 1956) shows on page 269 the Superior Court stating that petitioner is bound by *any finding* of the federal court.[4] Such a viewpoint is not in accord with the points of law in regard to findings upon which an appeal cannot be had by a successful party whose total claims have been granted in a judgment according to United States Supreme Court and California State Supreme Court decisions.

Upon being ordered to put on his evidence as to the liability of respondent in conversion, petitioner then immediately established a prima facie case of conversion by proving (1) the ownership of the land, (2) the cutting and asportation of timber, and (3) the subsequent possession by respondent. This is the only proof required to establish a prima facie case of conversion, in accordance with well established law (*United States v. Denver & Rio Grande Railway*, 191 U.S. 84).

Petitioner offered and had received in evidence the deed to him in 1926 showing ownership in fee simple (R.T. 150, 151, Pl. Ex. 3). The cutting and asportation of the timber and lumber, and its subsequent possession by respondent, with demand and refusal are admitted in respondent's pleadings and such facts were also received in evidence in many of petitioner's exhibits in evidence; and further conceded in respondent's answering brief on appeal, and so found by the trial court herein.

In addition to establishing his *prima facie* case by the foregoing evidence, petitioner offered and had re-

Footnote 4

"THE COURT: We will start from the beginning.

Defendant's Exhibits A and B deal with a certain writ of attachment and return, and they both deal with this Superior Court matter. They are stricken.

Mr. Babb: They are stricken?

The Court: Yes.

Mr. Liskum: Those are mentioned in the findings of fact in his exhibit.

The Court: That may be.

Insofar as they are dealt with in the findings of fact, of course the Eistrats having submitted to the jurisdiction of the Federal Court, are bound by any holding or finding.

Defendant's Exhibit C dealt with the Addenda to the contract. That is stricken on the Court's own motion.

Defendant's Exhibit E is the complaint. That is stricken.

Defendant's Exhibit F is the amended proof of claim in the bankruptcy action, and that is stricken.

Defendant's Exhibit H, which is the reporter's transcript of the bankruptcy proceedings, that matter was offered in evidence and the ruling reserved. The objection is sustained.

Mr. Liskum: That is the transcript?

The Court: That is the transcript.

Also, all evidence with reference to page 10, 11 and 12 of Defendant's H is stricken on the Court's own motion. I believe a ruling was reserved on that on your motion to strike.

Mr. Babb: Yes, that is right.

The Court: Then your motion is granted. It is your motion. Does that leave anything in the file on the Tulare action? I don't believe so.

Mr. Babb: Nothing.

The Court: Defendant's Exhibit I was never identified and was never admitted. It wasn't reoffered, but I just want to make that clear.

Defendants Exhibit J deals with a petition to reclaim property and is merged in the findings. The offer of this was objected to and overruled, but at this time for the reasons stated in the objections the Court strikes that.

I don't believe there was any real objections to Defendant's Exhibit K, but it neither adds to nor detracts from the matter, and that may stay in. That is the debtor's petition. It is only in for the date.

Mr. Liskum: Are you leaving that in?

The Court: Yes.

Also, that testimony adduced from the witness, Mr. Eistrat, relative to a certain cashier's check in the amount of $1,200 and all reference thereto, the motion to strike is reserved and that motion is granted. It has been unconnected with the pending matter." (R.T. 32, R.T. Brush case, 229-231)

ceived in evidence the federal judgment, with findings and conclusions of law (Appendix D, hereto), and many other documents from the federal case. These documents supported petitioners allegations in his complaint that Jones, under whom respondent claims title, never had any right, title or interest in the timber, logs, lumber on or removed from petitioners land.

And the reporter's transcript on appeal further shows respondent preventing petitioner offering evidence as to the matters between Jones and petitioner in regard to the lumber respondent took through Jones from petitioner's land by having objections to anything said by petitioner to Jones outside of the presence of respondent rejected as hearsay:

> "MR CARVER: If your Honor please, I will object to what Mr. Eistrat said outside the presence of this defendant as hearsay as to this defendant.
>
> THE COURT: Sustained" (R.T. 188:12-15).

And the court thereafter denied petitioner's motion to strike all evidence in this action pertaining to any agreements between Jones and petitioner—and the court denied this motion as follows:

> "MR. EISTRAT: Your Honor, may I make a motion that all evidence in this action pertaining to any agreements between Eistrat and Jones be stricken as not pertinent to this action? No contract was made between Eistrat and Western Hardwood Lumber Company. No agreement was made except for the agreement to be bound by the decisions (of the federal court)." "No agreement for the operation of the defendant upon plaintiff's land was ever made—."

MR. CARVER: May I object to that motion, for the purpose of the record, your Honor?

THE COURT: Yes.

MR. CARVER: It seems obvious to me that, whereas we may invoke the hearsay rule as to what was said to Mr. Eistrat out of our presence, certainly if Mr. Eistrat executed this document, he cannot deny that he executed this document; it is in evidence. He stated that it was in his handwriting. And I believe the motion should be denied, your Honor.

MR. EISTRAT: I objected to the introduction of it, your Honor.

THE COURT: Motion denied." (R.T. 207:9 to 208:8)

Petitioner thereafter attempted to refute any inferences or evidence that might have remained in the record from the trial of respondents affirmative defense of res adjudicata of the Brush case (ruled on adversely to respondent before petitioner was permitted to commence his case). The court prohibited petitioner from offering such evidence, as follows:

"MR. EISTRAT: This is testimony that goes to explain the evidence which you have offered and has been received, and is connected therewith, and I believe, if a letter is offered in evidence and received, a party has a right to offer in evidence and have received the reply thereto.

THE COURT: What does Brush Industrial have to do with this case?

MR. EISTRAT: I will bring it out in just one moment, your Honor.

THE COURT: Bring it out now. Answer my question. What does Kratz have to do with Western Hardwood?

MR. EISTRAT: Quite a bit, your Honor. The defendant is claiming that an attachment was made in the Tulare County action.

THE COURT: Well, don't anticipate the defenses. Just confine yourself to the testimony on your own complaint now. You are putting on your own case now. Never mind the defenses. Let the defense put on its own case. You will have an opportunity to rebut those, if you wish to.

MR. EISTRAT: Then I am faced with this—I then move, your Honor, that the—Well, I rest my testimony—.

THE COURT: You may cross examine at this time.

MR. CARVER: No questions, your Honor.

THE COURT: All right, Call your next witness, Mr. Eistrat.

MR. EISTRAT: No further witnesses, your Honor.

THE COURT: The plaintiff rests?

MR. EISTRAT: The plaintiff rests." (R.T. 221:9 to 222:12)

At this point of the trial petitioner had proved all the essential elements as to the liability of respondent, and the court had explicitly prohibited petitioner from anticipating respondent's defenses. The entire defense then put on by respondent was the testimony of petitioner that he took money from Jones. Petitioner rebutted this testimony with his testimony that the

money taken from Jones was applied to payment of damages and not in payment for any timber or lumber (R.T. 225-231).

The respondent-defendant then made motion for a non-suit, whereupon the trial court stated it would prefer not to rule against defendant on the motion for non-suit. The trial court then pressed the defendant to withdraw its motion for non-suit; the defendant then made the request; and then the trial court ordered the motion for non-suit withdrawn.

Respondent did not establish any defense after petitioner had established his prima facie case of conversion. The evidence of petitioner taking money was the only evidence offered by respondent. The taking of money did not establish respondent's affirmative defense of payment. The law on this point is clear (*Hollywood Wholesale Electric v. Baskin*, 123 CA 2d 415, 263 P 2d 665; *Souza v. First California Co.*, 101 CA 2d 534, 225 P 2d 955):

> "The defense of payment is affirmative and is never established by mere proof that the claimant has received money. The proof must go further and establish that the money so received can be applied in discharge of the debt or obligation."
>
> *Hollywood Wholesale Electric v John Baskin, Inc.*, 121 CA 2d 415, 263 P 2d 665.

Then without further proceedings the respondent and petitioner rested and the court immediately ordered judgment for respondent (R.T. 231).

The findings prepared by respondent were objected to, but signed as made by respondent without hearing for a settlement of the findings. Motion for new trial

was made, supported by lengthy affidavit and memorandum of points and authorities, and it too denied without opinion from the court as to the basis for its decision. On the motion for new trial petitioner stated:

> "I would also like to state for the record, your Honor, that I believe that the proceedings heretofore had herein have been a denial of due process and equal protection of law, in contravention of the 14th Amendment of the United States Constitution." (R.T. 232)

In petitioners timely filed appeal to the District Court of Appeal of the State of California, Second District, he set forth in his opening brief by assignment of error that "the judgment is in contravention of the XIVth Amendment of the United States Constitution and the authorities cited." (App. O.B. 18) Petitioner pointed out that he had established his case in evidence and was entitled to judgment; and there were no substantial evidence to support any of the findings in favor of respondent, or to support the judgment. Petitioner also stated therein that "The finding in the federal findings as to the acceptance of payments was wholely unnecessary to support that federal judgment; and being adverse to supporting that judgment were non-appealable mere surplusage," citing *Lindheimer v Illinois Bell Tel. Co.*, 292 U.S. 151, 176, and *Elect. Fittings Corp. v Thomas & Betts Co.*, 307 U.S. 241. Petitioner also therein stated, "Said unnecessary adverse finding of the federal court that is contrary to the findings that support that decree cannot be considered evidence in favor of defendant herein (*Albertson v. Raboff*, 46 AC 377, 295 P 2d 405) (App. O.B. 13).

Petitioner's reply brief also raised federal questions in regard to the court's rejections of offers of proof being "clearly a denial of due process of law in contravention of the XIVth Amendment of the United States Constitution." (App. R.B. 12)

The District Court of Appeal entered its opinion affirming the judgment (Appendix C, hereto), and ruling upon the substantial federal questions raised by petitioner as follows:

> Petitioner "—was fully heard and he had every opportunity to offer numerous exhibits (40 in all), present his evidence and argue extensively. The record does not show that plaintiff was in any way precluded from putting on his case."
>
> Appendix B-16 hereto

and that:

> "Here again are presented questions of fact which the trial court decided adverse to plaintiff. The evidence is substantial to support the findings and the reviewing court will not disturb it. Furthermore, the Federal court heretofore made a similar finding in this connection which is binding on plaintiff."
>
> Appendix B-16, 17, hereto

and that:

> "Appellant objects to the trial court's finding herein on the ground that the Federal court's finding upon which it was based was unnecessary to support the Federal judgment, was surplusage and therefore cannot bind plaintiff. There is no doubt but that plaintiff, a party to the bankruptcy

action, is bound by the Federal court's finding that plaintiff waived certain defaults of Jones Company by accepting payments from it, as well as by accepting payments upon plaintiff's claim in bankruptcy." (*Bernhard v. Bank of America*, 19 Cal. 2d 807; *Hardware Mut. Ins. Co. v. Valentine*, 119 Cal. App. 2d 125; *Martin Music Co. v. Robb*, 115 Cal. App. 414) "The payments referred to by the Federal court are those received by plaintiff from Jones Company after plaintiff notified it of its breach and terminated the agreement. The last payment accepted by plaintiff consisted of $1,600 on December 3, 1948."

Appendix B-12, 13, hereto.

Petitioner timely filed a 39 page petition for rehearing in said District Court of Appeals, pointing out that:

(1) the said District Court of Appeal's opinion holding that petitioner was bound by it's interpretation of court's findings under the facts of this case was directly contrary to the decisions of the United States Supreme Court in *Electrical Fitting Corp. v Thomas & Betts*, 307 U.S. 241, and *Lindheimer v. Illinois Bell Tel.*, 292 U.S. 151, 176, and the California State Supreme Court in regard to state court findings in *Albertson v Raboff*, 46 Cal. 2d 375—and a denial of due process and equal protection of law under the 14th Amendment of the United States Constitution, and,

(2) the said District Court of Appeal's opinion relies upon substantial matters of allegations of

affirmative defense upon which the trial court specifically prohibited plaintiff from offering evidence—to plaintiff's detriment in contravention of the 14th Amendment of the United States Constitution, and,

(3) that said opinion omits or incorrectly states the evidence favorable to plaintiff's case, while stating matters as facts favorable to defendant which were untrue and upon which the trial court had prohibited plaintiff from offering any evidence.

The Clerk's transcript before the District Court of Appels shows that petitioner alleged in his complaint that respondent took the lumber from Jones knowing Jones did not own the timber, and also knowing Jones was operating in violation of the forest fire laws.

The Clerk's transcript before the District Court of Appeal shows the trial court found those allegations of petitioner's complaint to be untrue; and in addition it made the following finding VIII as follows:

"That each and all of the allegations set forth in paragraph XI of the third cause of action of plaintiff's Third Amended Complaint are true, except the following, to-wit: It is not true that defendant at any time subsequent to August 6, 1948, or at all, ever was in possession of, or on, plaintiff's real property." (Appendix C-22, hereto)

Respondent's Answering Brief filed in the District Court of Appeal states (p. 15) the following in regard to its taking of the lumber:

"When the owner of property clothes another with the apparent title to, or power of disposition

over it, and an innocent third party has been induced to deal with the apparent owner in reference thereto, the true owner is estopped from afterwards asserting his title." (R.A.B. 15)

The District Court of Appeal's opinion (Appendix B-17, 18 hereto) uses this same statement, as follows:

"Where the owner of a property clothes another with the apparent title to, and power of disposition of it and an innocent third party has thereby been induced to deal with the apparent owner in reference thereto, the true owner is estopped from afterwards asserting his title."

The District Court of Appeal's opinion (Appendix B-17, hereto) also states in regards to respondent's knowledge of ownership and violation of fire laws that:

"The record does not show evidence to support any kind of a finding that the defendant knew of Jones Company's violation of the fire laws; that defendant knew Jones Company did not own the timber;"

Respondent did not object to having the deposition of its Vice-President, Mr. Sterling L. Stofle, received in evidence (R.T. 168; 169, Pl. Ex. 20). This evidence shows Mr. Stofle in charge of purchasing most lumber from 1947 through 1951—having the lumber taken from Jones—and admitting his going up to the Jones mill for the purpose of seeing the sawdust burner in operation—and admitting his knowing it was not in operation—and admitting Jones told him prior to his visit that the ranger insisted he get a burner—and admitting that respondent advanced Jones $3,000 to

build that burner—and also admitting that Jones then told him that Jones did not own the timber. These mat-

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Footnote 1:

"Q. BY MR. EISTRAT: What was your occupation at all times during 1947 through 1951?

A. I was Vice-President of Western Hardwood Lumber Company.

Q. That is the defendant in this case?

MR. DUDLEY K. WRIGHT: We will stipulate it is.

Q. BY M. EISTRAT: What were your duties at that time as Vice-President of Western Hardwood Company?

A. I both purchased most lumber and was also sales manager.

Q. Did the Western Hardwood Lumber Company ever buy any lumber from Jones Lumber"—"

A. Yes.—" (R.T. 168:169, Pl 20 3:22 to 4:9)

"Q. As I recollect, you then were up to Glenville more than one time?

A. Twice. That is, stopping in Glenville upon the occasion of my second visit when at that time the mill had been transferred from down below up into the hills.

Q. And did you go into the woods and see the mill in the woods?

A. Yes.

Q. And was the sawdust burner in operation while you were there?

A. It was there was actually the reason for my visit but the brick foundation or something had caved in and it was not in operation.

Q. Did Tom Jones then tell you that he had to get the sawdust burner in operation?

A. Well, he had told me prior to my visit that the ranger insisted that he get a burner.

A. And did the Western Hardwood Lumber Company loan him $3,000 to build that burner?

A. Yes." (R.T. 168:169, Pl 20 6:11 to 7:4)

Q. Now, Mr. Stofle, you have stated that while you were up in the woods where this Jones mill was operating you saw some men scaling logs and you knew that they were not employees of the Jones Lumber & Mill Company. Did you know that of your own knowledge?

A. No, I asked Mr. Jones.

Q. And what did he tell you?

A. Just said that they were the scalers for the owner of the timber.

Q. Is that what he told you?

A. Yes.

Q. Do you recall that clearly?

A. Yes,—" (R.T. 168:169, Pl 20, 16:12 to 24, Pet. R.H. 25:26)

ters were raised in petitioners motion for new trial, and briefs in the courts below. Finding V of the trial court (Appendix C-21, hereto) describes this $3,000 advanced to build the burner according to above evidence as being $3,000 loaned to Jones about August 18, 1948 and to be repaid by loads of lumber. The foregoing admissions from the deposition in evidence are set forth in footnote below[1]. There was no evidence offered or received contradicting those expresss admissions in evidence of respondent's vice-president.

Upon denial of said petition for rehearing in said District Court of Appeals, petitioner timely filed a 99 page petition for hearing (with complete record of all documents filed in the courts below) in the California State Supreme Court. In said petition for hearing petitioner set forth in greater detail (again by assignment of error) the same substantial federal questions raised in the courts below (App. P.H. 10-12).

In addition petitioner also stated therein:

> "Actually those unnecessary federal court findings not included in and adverse to that federal judgment cannot lawfully be used against petitioner herein—not only because it would be unfair, but also because the long established federal and state case law prohibit their use—and what is in effect a collateral attack upon the federal judgment, and a refusal to give that federal judgment full faith and credit as required by Article VI of the United States Constitution. The following authorities and texts set forth the established law on this point:
>
> "The appeal of the Company. The Company was successful in the District Court and has no

right of appeal from the decree in its favor. The Company is not entitled to prosecute such an appeal for the purpose of procuring a review of the findings of the court below with respect to the value of the Company's property or the other findings of which it complains."

Lindheimer v Illinois Bell Tel. Co. (1933), 292 U.S. 151, 78 L Ed 1197

Elect. Fittings Corp. v Thomas & Betts Co., 307 U.S. 241

"The findings with respect to the intent and understanding of defendent and plaintiff's husband were unnecessary to the judgment, and since defendant was the prevailing party as to the cause of action based upon the I.O.U., she could not have attacked the unnecessary findings adverse to her on appeal. Under these circumstances the findings are not res judicata "(cases cited)" and cannot over come plaintiff's express allegation . . ."

Albertson v Raboff, 46 Cal 2d 375, 295 P 2d 405

"It is pretty well settled in this state and elsewhere that where a finding is contrary to a judgment or order rendered, or immaterial to it, and the judgment or order is based upon other findings that do support it, the findings contrary or immaterial are not adjudications against the party who prevails."

Estate of Funkenstein, 170 Cal 594

"Where a judgment is rendered by a court of first instance in favor of a party, but a particular issue is decided against him, and because the judgment is rendered in his favor he has no ground for appealing from the judgment, the findings on the particular issue decided against him is not conclusive in a subsequent action between the parties based upon a different cause of action. Thus, if the defendant interposes two defenses, either of which is sufficient to bar plaintiff's claim, and there is a finding for the defendant on one of the issues, a finding for the plaintiff on the other issue is not binding in a subsequent action upon a different cause of action. One reason for this is that the finding is not material to the judgment (see sec. 68, comment o); another reason is that the defendant, having been successful in the action, cannot appeal and obtain the ruling of the appellate court as to the finding against him."

Restatement of the Law of Judgments (1942), pp. 316-317

"Sec. 69, Inability of appeal, Comment o. In accord. *Estate of Funkenstein*, 170 Cal. 594, 150 Pac. 987 (1915) ("It is pretty well settled in this state and elsewhere that where a finding is contrary to a judgment or order, or immaterial to it, and the judgment or order is based upon other findings that do support it, the findings contrary or immaterial are not adjudications against the party who prevails,"); *Fulton v. Hanlow*, 20 Cal. 450 (1861); *Lillis v. Emigrant Ditch Co.*, 95 Cal. 553, 559, 30 Pac. 1108, 1110 (1892); *Chapman*

v. Hughes, 134 Cal. 641, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982 (901); *Collins v. Gray*, 154 Cal 131, 97 Pac. 142 (1908)."

California annotations (1953) *to Restatement of the Law of Judgments, section* 69

As pointed out in appellant's petition for rehearing in the court below (pages 3-8 of that petition), it is submitted that the lower appellate court holds in contravention of the 14th Amendment to the United States Constitution and of the rules of law set forth by the United States Supreme Court and also the California State Supreme Court to appellant's substantial deriment. Appellant specifically request this Honorable California State Supreme Court rule herein upon this important California state and also federal question." (App. P.H. 18-21)

The hearing in the California State Supreme Court was denied without opinion on December 17, 1958.

The record shows that the federal questions were timely and properly raised in the state courts below. Petitioner believes the rulings herein of these state courts on these important federal questions are not in accord with the applicable decisions of the United States Supreme Court.